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No. 9854

No. 14112

United States
Court of Appeals
for the Ninth Circuit

LOIS J. NEWMAN (formerly Lois J. Senderman), Petitioner,

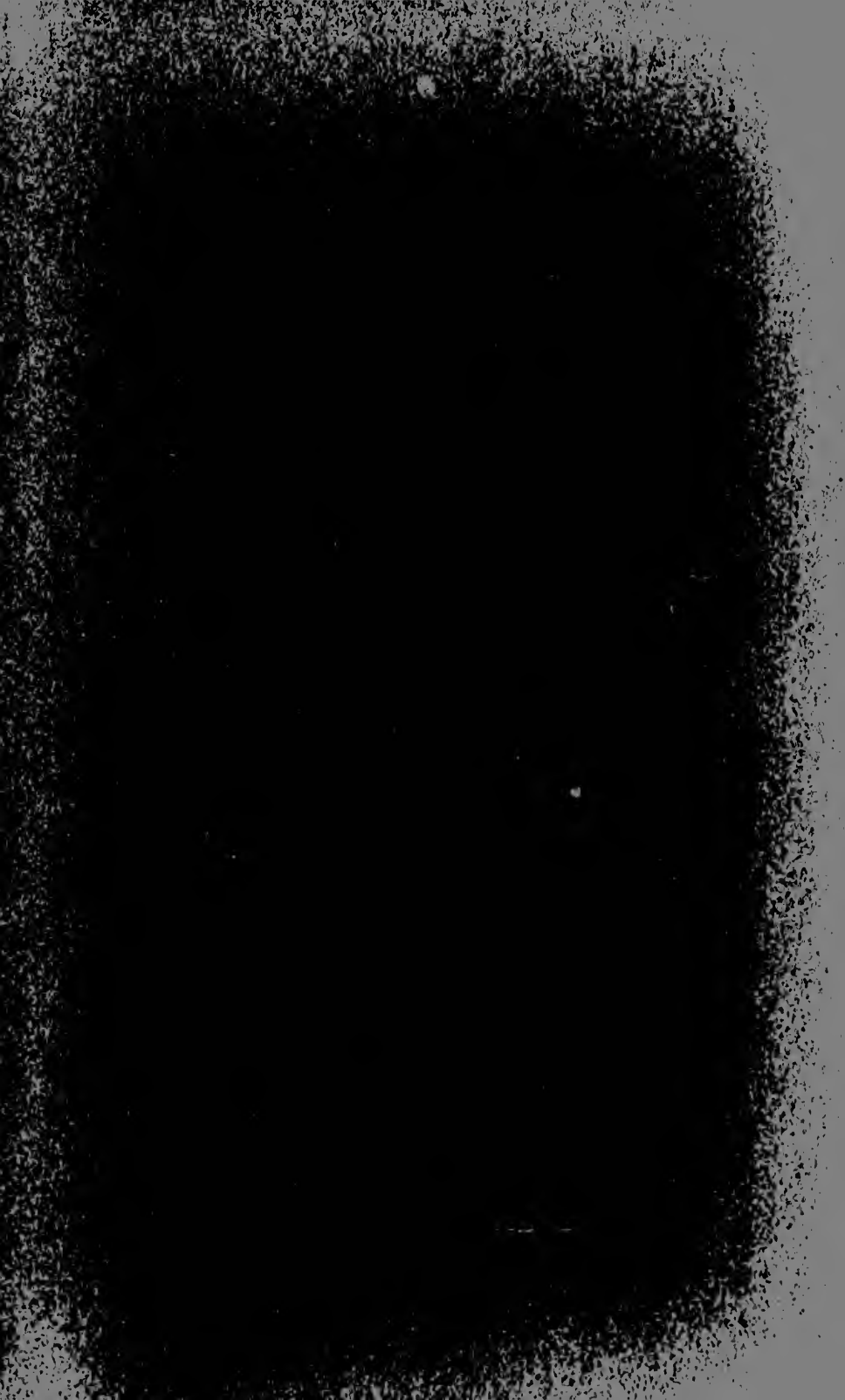
vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Petitioner:

SAMUEL TAYLOR, Esq. (Withdrawn)
WALTER J. SCHWARTZ, Esq. (Withdrawn)
MARTIN GANG, Esq.,
LOUIS M. BROWN, Esq.,
NORMAN R. TYRE, Esq.

For Respondent:

EDWARD H. BOYLE, Esq.

DOCKET ENTRIES

1950

Jul. 24—Petition received and filed. Taxpayer notified. Fee paid.

Jul. 25—Copy of petition served on General Counsel.

Sept. 19—Answer filed by General Counsel.

Sept. 19—Request for hearing in San Francisco filed by General Counsel.

Sept. 22—Notice issued placing proceeding on San Francisco calendar. Service of answer and request made.

1951

Jan. 10—Hearing set March 12, 1951, San Francisco.

Feb. 12—Motion to continue to the next San Francisco, California, calendar filed by taxpayer. Granted. 2/14/51 Copy served.

Aug. 9—Hearing set October 29, 1951, San Francisco.

1951

Nov. 2—Hearing had before Judge Van Fossan, on merits. Petitioner's oral motion to file amended petition. Granted and oral motion for respondent to file answer to amended petition. Granted. Stipulation of facts with exhibits 1-A thru 12-L, inclusive, filed, amended petition and answer to amended petition filed at hearing. Copies served. Petitioner's brief due January 2, 1952. Respondent's brief due February 18, 1952. Petitioner's reply brief due March 19, 1952.

Nov. 20—Transcript of hearing November 2, 1951 filed.

Dec. 26—Stipulation to correct transcript filed.

Dec. 26—Motion for extension to February 4, 1952 to file brief filed by taxpayer. Granted. Copy served.

1952

Feb. 4—Motion for extension to March 4, 1952 to file brief filed by taxpayer. Granted. Copy served.

Mar. 3—Brief filed by taxpayer. Copy served.

Apr. 18—Motion for extension to May 2, 1952 to file brief filed by General Counsel. 4/21/52 Granted. Copy served.

May 2—Answer brief filed by General Counsel.

May 22—Motion for extension to July 2, 1952 to file reply brief filed by taxpayer. 5/22/52 Granted. Copy served.

1952

Jun. 23—Motion for extension to August 4, 1952 to file reply brief filed by taxpayer. 6/23/52 Granted. Copy served.

Aug. 4—Reply brief filed by taxpayer. 8/5/52 Copy served.

1953

Jan. 22—Findings of fact and opinion rendered, Van Fossan, Judge. Decision will be entered under Rule 50. Copy served.

Apr. 3—Respondent's computation filed.

Apr. 8—Hearing set May 13, 1953, on respondent's computation.

May 13—Hearing had before Judge Kern, on settlement under rule 50. Referred to Judge Van Fossan.

May 15—Decision entered, Van Fossan, Judge, Div. 9.

Jul. 10—Motion to withdraw as counsel Samuel Taylor and Walter G. Schwartz filed. Granted. Copy served.

Jul. 27—Entry of appearance of Martin Gang and Louis M. Brown as counsel filed.

Aug. 10—Petition for review by U. S. Court of Appeals, Ninth Circuit, with assignments of error filed by petitioner.

Aug. 10—Notice of filing petition for review with affidavit of service by mail attached filed by taxpayer.

Aug. 10—Petition for review by U. S. Court of Appeals, Ninth Circuit, filed by General Counsel.

1953

Aug. 13—Proof of service filed by taxpayer.

Aug. 14—Designation of contents of record with acknowledgment of service thereon filed by taxpayer.

Aug. 27—Entry of appearance of Norman R. Tyre as counsel filed.

Aug. 27—Motion for extension of time to November 6, 1953 for filing and docketing a consolidated record on review filed by General Counsel.

Aug. 28—Order enlarging time to November 6, 1953 for filing and docketing a consolidated record on review, entered.

Aug. 28—Proof of service of petition for review on counsel filed by General Counsel.

Oct. 16—Statement of points with statement of service by mail thereon, filed by General Counsel.

Oct. 16—Designation of contents of record on review with statement of service by mail thereon, filed by General Counsel.

The Tax Court of the United States

Docket No. 29650

LOIS J. NEWMAN (Formerly LOIS J. SENDERMAN), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols IRA:EG:90-D:IB and dated May 3, 1950, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual residing in Sherman Oaks, California. The petitioner duly filed her gift tax return for the calendar year 1946 on or about June 23, 1947 with the Collector of Internal Revenue for the First District of California at San Francisco, California.

2. The notice of deficiency (a copy of which is attached hereto as Exhibit A and is incorporated by reference herein) was mailed to petitioner by registered mail on May 3, 1950.

3. The taxes in controversy are gift taxes for the calendar year 1946 in the amount of $71,195.99.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(1) The Commissioner erred in determining that petitioner made a gift or gifts during the calendar year 1946.

(2) In the alternative to the assignment of error set forth in Paragraph 4 (1) above an assuming that this Court should determine that the Commissioner did not err as therein alleged, the Commissioner nevertheless erred in determining that the fair market value as of May 2, 1946, of an 8% interest as a limited partner in Aztec Brewing Company, a limited partnership, was $175,000.00, and further erred in failing to determine that the fair market value of said interest as of said date was $88,529.10.

(3) In the alternative to the assignment of error set forth in Paragraph 4 (1) above and assuming that this Court should determine that the Commissioner did not err as therein alleged, the Commissioner nevertheless erred in including among the gifts purportedly made by petitioner in the calendar year 1946, an item described in his notice of deficiency as "Overpayment of income tax and accrued interest for the years 1943-1945", the value of which item he determined to be $64,035.05.

(4) In the alternative to the assignments of error set forth in Paragraphs 4 (1) and 4 (3) and assuming that this Court should determine that the Commissioner did not err as therein alleged, the Commissioner nevertheless erred in determining that the fair market value as of May 2, 1946 of the item described in his notice of deficiency as "Overpay-

ment of income tax and accrued interest for the years 1943-1945" was $64,035.05.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) Petitioner's name at all times material hereto prior to December, 1944 was Lois J. Senderman. Petitioner's name from December, 1944 to the present has been Lois J. Newman.

(2) On or within a few days after January 1, 1943, petitioner established an irrevocable oral trust for the benefit of her minor daughter, Lois E. Senderman, and designated Richard S. Goldman as the trustee of such trust. Petitioner specifically provided that said trust was irrevocable. Petitioner thereby intended to make and did make an absolute and irrevocable gift, no part of which could or did revert to petitioner. A suit brought in the Superior Court of the State of California in and for the City and County of San Francisco (in the Matter of the Estate and Guardianship of Lois E. Senderman, a Minor, Number 103176) established that said oral trust was irrevocable.

(3) The corpus of said trust as of the date of its creation comprised 800 shares of stock in the Aztec Brewing Company, a California corporation. The fair market value of said 800 shares of stock as of said date was $30,000.00. Petitioner duly included said gift in her gift tax return for the calendar year 1943, which return was duly filed with the Collector of Internal Revenue for the First District of California at San Francisco, California.

Said return showed that no gift tax was due from petitioner for said calendar year.

(4) Approximately six or seven months after the establishment of the oral trust referred to in Paragraph 5 (2), above, Richard S. Goldman, the trustee of said trust, executed a written declaration of trust which was intended to embody the terms of said oral trust. Petitioner and said trustee signed said declaration. Through the inadvertence and mistake of said trustee, said written declaration did not include an express provision that said trust was irrevocable.

(5) The trust created by petitioner as aforesaid terminated upon the death of Richard S. Goldman, the trustee thereof. Said trustee died on March 1, 1946. On that date the corpus and accumulated income of said trust became the absolute property of Lois E. Senderman, the beneficiary thereof. On May 2, 1946, Clarissa Shortall was duly appointed as the guardian of the estate of said Lois E. Senderman. The corpus and accumulated income of said trust was thereupon immediately transferred to said guardian. Petitioner made no gifts during 1946.

(6) The fair market value of the corpus and accumulated income of the trust created by petitioner as aforesaid was not in excess of $228,831.49 as of the date of death of said Richard S. Goldman. The fair market value of the assets transferred to Clarissa Shortall as guardian, as aforesaid, was not in excess of $228,831.49 as of the date of her appoint-

ment as guardian and as of the date of transfer of said assets to her.

(7) The fair market value of an 8% interest as a limited partner of Aztec Brewing Company, a limited partnership, was not in excess of $88,529.10 as of the date of death of said Richard S. Goldman, as of the date of appointment of said Clarissa Shortall as guardian of the estate of said Lois E. Senderman and as of the date of delivery of the assets of the trust to said Clarissa Shortall.

(8) During each of the calendar years 1943 through 1946, income tax returns were duly filed on behalf of the trust created by petitioner as aforesaid (known as the Lois E. Senderman Trust) and by Lois E. Senderman, a minor, with the Collector of Internal Revenue for the First District of California at San Francisco, California. The tax, if any, shown thereon to be due was duly paid. By means of letters of the type commonly known as 30-day letters, addressed to said Trust and to said minor, both of which are dated August 25, 1949, the Internal Revenue Agent in Charge, San Francisco Division, has proposed overassessments in income tax in favor of said Trust and of said minor as follows:

Calendar Year	Taxpayer	Amount of Proposed Overassessment
1943	Lois E. Senderman, a minor	$3,285.48
1944	Lois E. Senderman, a minor	6,776.42
1945	Lois E. Senderman Trust	52,701.57

Said Trust and said minor do not agree with said proposed overassessments and have duly protested them. No part of any of said proposed overassess-

ments nor any interest thereon has been received by said Trust or by said minor. Petitioner did not make a gift of any part of said purported overassessments or overpayments of income tax or of any accrued interest thereon during the calendar year 1946.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in gift tax for the calendar year 1946 due from petitioner and that it may grant such further relief as may to it seem proper.

Dated: San Francisco, California, July 21, 1950.

Respectfully submitted,

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner

State of California,
County of Los Angeles—ss.

Lois J. Newman, being first duly sworn, deposes and says:

She is the petitioner named in the foregoing petition; she has read said petition and is familiar with the statements contained therein; and such statements are true except those stated to be upon information or belief, and those she believes to be true.

/s/ LOIS J. NEWMAN

Subscribed and sworn to before me this 11th day of July, 1950.

[Seal] /s/ EVELYN RUTH TATE,
Notary Public in and for the County of Los Angeles, State of California. My commission expires Dec. 9, 1953.

EXHIBIT "A"

U. S. Treasury Department
Office of Internal Revenue Agent in Charge
7th Floor, 74 New Montgomery Street
San Francisco 5, Calif.

Internal Revenue Service San Francisco Division.
In reply refer to IRA:EG:90-D:IB

May 3, 1950

Mrs. Lois J. Newman (Formerly
Mrs. Lois J. Senderman)
c/o Samuel Taylor
1211 Balfour Building
351 California Street
San Francisco 4, California

IT:EG-46-First California
Donor: Lois J. Newman (formerly Lois J. Senderman)

Dear Madam:

You are advised that the determination of your gift tax liability for the calendar year 1946 discloses a deficiency of $71,195.99, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, 7th Floor, 74 New Montgomery Street, San Francisco 5, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

GEO. J. SCHOENEMAN,
Commissioner

/s/ By R. L. SUTHERLAND,
Internal Revenue Agent in Charge

Enclosures: Statement, Form 1276, Form of Waiver.

DRU

Statement

Gift Tax Year 1946: Liability $71,195.99; Assessed, $0.00; Deficiency, $71,195.99.

In making this determination of your Federal gift tax liability for the year 1946, careful consideration has been given to the protest filed March 13, 1950 and to statements made at a conference held on March 27, 1950.

A copy of this letter and statement has been mailed to your representative, Samuel Taylor, 1211 Balfour Building, San Francisco 4, California.

ADJUSTMENTS TO NET GIFTS

	Returned	Determined
(a) Total gifts	$ 0.00	$374,337.44
Less exclusions	0.00	3,000.00
Amount of gifts included	$ 0.00	$371,337.44
Specific exemption	0.00	30,000.00
Net gifts, 1946	$ 0.00	$341,337.44

EXPLANATION OF ADJUSTMENTS

	Returned	Determined
(a) Total gifts	$ 0.00	$374,337.44

On or about May 2, 1946, there was distributed to Clarissa Shortall, as guardian of the estate of Lois E. Senderman, a minor, the corpus of that certain revocable trust created on January 1, 1943, by donor, then named Lois J. Senderman. It is held that the transfer of the trust corpus to the guardian of the estate of Lois E. Senderman, constitutes a completed gift by the donor in the year 1946. The fair market value on May 2, 1946 of each item comprising the trust corpus is determined as follows:

Cash	$ 24,577.39
$ 5,000.00 Nebraska Power Company bonds, 4½s of 1961	5,350.00
$ 5,000.00 Philadelphia Electric Power bonds, 5½s of 1972	5,325.00
$10,000.00 Safe Harbor Water Power Corporation bonds, 4½s of 1979	10,500.00
$ 5,000.00 Series E bonds, due 1-1-53	3,900.00
$ 2,000.00 Series E bonds, due 1-1-54	1,530.00
$ 3,000.00 Series E bonds, due 6-1-54	2,280.00
$ 5,000.00 Series E bonds, due 1-1-55	3,775.00
$ 100.00 Series E bonds, due 6-1-55	75.00
$ 5,000.00 Series G bonds, due 6-1-55	4,940.00
$ 5,000.00 U. S. Treasury bonds, 1½s of 1950	5,075.00
$55,000.00 U. S. Treasury bonds, 2½s of 1967-72	56,925.00
100 shares General Electric common stock	5,050.00
100 shares Chesapeake and Ohio Railway common stock	6,000.00
8% interest as a limited partner of Aztec Brewing Company, a limited partnership	175,000.00
Overpayment of income tax and accrued interest for the years 1943-1945	64,035.05
Total	$374,337.44

COMPUTATION OF GIFT TAX

	Returned	Determined
Net gifts for 1946	$ 0.00	$341,337.44
Total net gifts for prior years	0.00	0.00
Total net gifts	$ 0.00	$341,337.44
Tax on total net gifts	$ 0.00	$ 71,195.99
Tax on net gifts for prior years	0.00	0.00
Tax on net gifts for 1946	$ 0.00	$ 71,195.99
Total tax assessed		0.00
Deficiency in gift tax		$ 71,195.99

[Endorsed]: T.C.U.S. Filed July 24, 1950.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except denies that petitioner's gift tax return was duly filed.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the petition.

4. (1) to (4), inclusive. Denies the allegations of error contained in subparagraphs (1) to (4), inclusive, of paragraph 4 of the petition.

5. (1) Admits the allegations contained in subparagraph (1) of paragraph 5 of the petition.

(2) Admits on January 1, 1943, petitioner established a trust for the benefit of her minor daughter, Lois E. Senderman, and designated Richard S. Goldman as the trustee of such trust; denies the remaining allegations contained in subparagraph (2) of paragraph 5 of the petition.

5. (3) Admits the allegations contained in subparagraph (3) of paragraph 5 of the petition, except as follows: denies that the fair market value of the stock on January 1, 1943, was $30,000.00;

that the said gift was duly included in petitioner's gift tax return; and that the return was duly filed.

(4) Denies the allegations contained in subparagraph (4) of paragraph 5 of the petition.

(5) Admits that the trustee, Richard S. Goldman, died in 1946, and that during said year the corpus and accumulated income of a certain trust became the absolute property of Lois E. Senderman, the beneficiary thereof; that on May 2, 1946, Clarissa Shortall was duly appointed as the guardian of the estate of said Lois E. Senderman, and that the corpus and accumulated income of that certain trust was thereupon immediately transferred to said guardian; denies the remaining allegations contained in subparagraph (5) of paragraph 5 of the petition.

(6) Denies the allegations contained in subparagraph (6) of paragraph 5 of the petition.

(7) Denies the allegations contained in subparagraph (7) of paragraph 5 of the petition.

(8) Admits the allegations contained in subparagraph (8) of paragraph 5 of the petition, except as follows: for lack of knowledge or information sufficient to form a belief, denies that the income tax returns were duly filed and that any tax shown thereon to be due was duly paid.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's

determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
T. M. MATHER,
LEONARD ALLEN MARCUSSEN,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Sept. 19, 1950.

[Title of Tax Court and Cause.]

AMENDED PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols IRA:EG:90-D:IB and dated May 3, 1950, and as a basis of her proceeding alleges as follows:

1. The petitioner is an individual residing in Sherman Oaks, California. The petitioner duly filed her gift tax return for the calendar year 1946 on or about June 23, 1947 with the Collector of Internal Revenue for the First District of California at San Francisco, California.

2. The notice of deficiency (a copy of which is

attached to the original Petition in this case as Exhibit A and is incorporated by reference herein) was mailed to petitioner by registered mail on May 3, 1950.

3. The taxes in controversy are gift taxes for the calendar year 1946 in the amount of $71,195.99.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(1) The Commissioner erred in determining that petitioner made a gift or gifts during the calendar year 1946.

(2) In the alternative to the assignment of error set forth in Paragraph 4 (1), above, and assuming that this Court should determine that the Commissioner did not err, as therein alleged, the Commissioner nevertheless erred in determining that the fair market value as of May 2, 1946 of an 8% interest as a limited partner in Aztec Brewing Company, a limited partnership, was $175,000.00, and further erred in failing to determine that the fair market value of said interest as of said date was any amount in excess of $88,529.10.

(3) In the alternative to the assignment of error set forth in Paragraph 4 (1), above, and assuming that this Court should determine that the Commissioner did not err as therein alleged, the Commissioner nevertheless erred in including among the gifts purportedly made by petitioner in the calendar year 1946, an item described in his notice of deficiency as "Overpayment of income tax and

accrued interest for the years 1943-1945," the value of which item he determined to be $64,035.05.

(4) In the alternative to the assignments of error set forth in Paragraphs 4 (1) and 4(3), above, and assuming that this Court should determine that the Commissioner did not err as therein alleged, the Commissioner nevertheless erred in determining that the fair market value as of May 2, 1946 of the item described in his notice of deficiency as "Overpayment of income tax and accrued interest for the years 1943-1945" was $64,035.05.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

(1) Petitioner's name at all times material hereto prior to December, 1944 was Lois J. Senderman. Petitioner's name from December, 1944 to the present has been Lois J. Newman.

(2) On or within a few days after January 1, 1943, petitioner established an irrevocable oral trust for the benefit of her minor daughter, Lois E. Senderman, and designated Richard S. Goldman as the trustee of such trust. Petitioner specifically provided that said trust was irrevocable. Petitioner thereby intended to make and did make an absolute and irrevocable gift, no part of which could or did revert to petitioner. Said gift comprised 800 shares of stock in the Aztec Brewing Company, a California corporation. Petitioner duly included said gift in her gift tax return for the calendar year 1943, which return was duly filed with the Collector of Internal Revenue for the First District of California at San Francisco, California. A suit

brought in the Superior Court of the State of California in and for the City and County of San Francisco (in the Matter of the Estate and Guardianship of Lois E. Senderman, a Minor, Number 103176) adjudicated that said oral trust was irrevocable.

(3) Approximately six or seven months after the establishment of the oral trust referred to in Paragraph 5 (2), above, Richard S. Goldman, the trustee of said trust, executed a written declaration of trust which was intended to embody the terms of said oral trust. Said written declaration construed as a whole is clearly intended and designated by its terms as irrevocable and as effecting an irrevocable and completed gift.

(4) Richard S. Goldman, the trustee of the trust created by petitioner as aforesaid, died on March 1, 1946. On May 2, 1946, Clarissa Shortall was duly appointed as the guardian of the estate of said Lois E. Senderman. The corpus and accumulated income of said trust was thereupon immediately transferred to said guardian pursuant to a court decree.

(5) Petitioner transferred no property by gift or for less than an adequate and full consideration in money or money's worth during 1946. If this Court should determine that petitioner transferred any property by gift or for less than an adequate and full consideration in money or money's worth during 1946, any such transfer was effected by a court decree, and such transfer, under the doctrine of

Harris vs. Commissioner (1950) 340 U.S. 106, was not subject to gift tax.

(6) The fair market value of the corpus and accumulated income of the trust created by petitioner as aforesaid was not in excess of $228,831.49 as of the date of death of said Richard S. Goldman. The fair market value of the assets transferred to said Clarissa Shortall as guardian, as aforesaid, was not in excess of $228,831.49 as of the date of her appointment as guardian and as of the date of transfer of said assets to her.

(7) The fair market value of an 8% interest as a limited partner of Aztec Brewing Company, a limited partnership, was not in excess of $88,529.10 as of the date of death of said Richard S. Goldman, as of the date of appointment of said Clarissa Shortall as guardian of the estate of said Lois E. Senderman and as of the date of delivery of the assets of the trust to said Clarissa Shortall.

(8) During each of the calendar years 1943 through 1946, income tax returns were duly filed on behalf of the trust created by petitioner as aforesaid (known as the Lois E. Senderman Trust) and by Lois E. Senderman, a minor, with the Collector of Internal Revenue for the First District of California at San Francisco, California. The tax, if any, shown thereon to be due was duly paid. By means of letters of the type commonly known as 30-day letters, addressed to said Trust and to said minor, both of which are dated August 25, 1949, the Internal Revenue Agent in Charge, San Francisco Division, has proposed over assessments in

income tax in favor of said Trust and of said minor as follows:

Calendar Year	Taxpayer	Amount of Proposed Overassessment
1943	Lois E. Senderman, a minor	$ 3,285.48
1944	Lois E. Senderman, a minor	6,776.42
1945	Lois E. Senderman Trust	52,701.57

Said Trust and said minor do not agree with said proposed overassessments and have duly protested them. No part of any of said proposed overassessments nor any interest thereon has been received by said Trust or by said minor. Petitioner did not make a gift of any part of said purported overassessments or overpayments of income tax or of any accrued interest thereon during the calendar year 1946.

(9) The Commissioner by a notice of deficiency dated January 23, 1951 determined deficiencies in income tax against the petitioner for the calendar years 1943 to 1947, inclusive. Said deficiencies were based mainly and said overassessments referred to in the preceding paragraph were based wholly upon including in petitioner's income the income arising in said years out of said gift made by petitioner in 1943. Petitioner had not reported said income in her income tax returns for the said years, and said trust and/or minor had reported said income in its and/or her income tax returns for said years. The petitioner on April 9, 1951 filed a petition with The Tax Court of the United States, Docket No. 33431, alleging that said deficiencies were erroneous. Said petition is now pending before this Court.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in gift tax for the calendar year 1946 due from petitioner and that it may grant such further relief as may to it seem proper.

Dated: San Francisco, California, October 12, 1951.

Respectfully submitted,

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed Nov. 2, 1951.

[Title of Tax Court and Cause.]

ANSWER TO AMENDED PETITION

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, and for answer to the amended petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition, except denies that petitioner's gift tax return was duly filed.

2 and 3. Admits the allegations contained in paragraphs 2 and 3 of the amended petition.

4. (1) to (4), inclusive. Denies the allegations of

error contained in subparagraphs (1) to (4), inclusive, of paragraph 4 of the amended petition.

5. (1) Admits the allegations contained in subparagraph (1) of paragraph 5 of the amended petition.

5. (2) Admits that petitioner filed a gift tax return with the Collector of Internal Revenue for the First District of California covering the calendar year 1943; denies the remaining allegations contained in subparagraph (2) of paragraph 5 of the amended petition.

(3) Admits that a written declaration of trust was executed; denies the remaining allegations contained in subparagraph (3) of paragraph 5 of the amended petition.

(4) Admits that said trustee, Richard S. Goldman, died on March 1, 1946, and that on May 2, 1946, Clarissa Shortall was duly appointed as the guardian of the estate of said Lois E. Senderman. Denies the remaining allegations contained in subparagraph (4) of paragraph 5 of the amended petition.

(5), (6) and (7) Denies the allegations contained in subparagraphs (5), (6) and (7) of paragraph 5 of the amended petition.

(8) Admits the allegations contained in subparagraph (8) of paragraph 5 of the amended petition, except as follows: Denies for lack of knowledge or information sufficient to form a belief that the returns were duly filed or the tax duly paid; denies the allegation that said trust and said minor do not agree with said proposed overassessments; de-

nies the allegation that petitioner did not make a gift of any part of said purported overassessments or overpayments of income tax or of any accrued interest thereon during the calendar year 1946.

(9) Admits the allegations contained in subparagraph (9) of paragraph 5 of the amended petition, except denies that said deficiencies were based mainly and said overassessments referred to in the preceding paragraph were based wholly upon including in petitioner's income the income arising in said years out of said gift made by petitioner in 1943.

6. Denies generally and specifically each and every allegation in the amended petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.
T. M. MATHER,
EDWARD H. BOYLE,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Nov. 2, 1951.

[Title of Tax Court and Cause.]

STIPULATION OF FACTS*

It is mutually stipulated and agreed by and between the parties hereto by their respective counsel that the following statements may be taken as true by the Court with the reservation that this stipulation shall be without prejudice to the right of either party to object to the introduction of any part thereof on the grounds of immateriality and irrelevancy or the right of either party to introduce further evidence not inconsistent with the facts herein stipulated:

1. The petitioner is an individual residing in Sherman Oaks, California. Petitioner's name at all times material hereto prior to December 1944 was Lois J. Senderman. Petitioner's name from December 1944 to the present has been Lois J. Newman. Petitioner was divorced from Aaron Senderman in 1940. From that time until December 1944 she was not married. In December 1944 she married Louis Newman.

2. Petitioner has a daughter by the name of Lois E. Senderman who was born on May 14, 1935. This daughter is the only child petitioner has ever had.

3. For a number of years prior to January 1, 1943, petitioner owned as her separate property 2396⅞ths shares of stock of Aztec Brewing Com-

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*Two counterparts of this Stipulation but only one set of Exhibits are being filed with the Court.

pany, a California corporation. These shares represented approximately one-fourth of the issued and outstanding stock of this corporation. The Aztec Brewing Company operated a brewery in San Diego, California.

4. On or about January 1, 1943, Richard S. Goldman acquired as trustee 800 shares of stock in said Aztec Brewing Company in trust for petitioner's daughter, Lois E. Senderman.

5. Petitioner filed a Federal gift tax return for the calendar year 1943 on March 15, 1944 with the Collector of Internal Revenue for the First District of California at San Francisco, California. A true and correct copy of said return is attached hereto and incorporated by reference herein as Exhibit 1-A.

6. In 1943, Richard S. Goldman executed as trustee a Declaration of Trust. A true and correct copy of said Declaration is attached hereto and incorporated by reference herein as Exhibit 2-B.

7. The petitioner filed a State of California gift tax return for the calendar year 1943 in which the petitioner reported a transfer of 800 shares of Aztec Brewing Company stock to her daughter. Said return was filed with the Controller of the State of California on or before April 15, 1944.

8. The valuation placed upon the 800 shares in the State of California gift tax return was the same as the valuation placed upon said shares in the Federal gift tax return, to wit: $30,000.00. The State of California inquired as to the facts on which said valuation was based and determined a

deficiency in petitioner's 1943 State of California gift tax. Said deficiency was paid by petitioner.

9. On or about February 24, 1944, Aztec Brewing Company, a limited partnership, was formed. A true and correct copy of the Certificate of Limited Partnership is attached hereto and incorporated by reference herein as Exhibit 3-C. On or about March 31, 1944 Aztec Brewing Company, a corporation, was dissolved. The assets and liabilities of said corporation were transferred to said partnership. The stockholders in said corporation became partners in the new partnership with partnership interests proportionate to their stockholdings in said corporation. The trust for Lois E. Senderman became a limited partner with an 8% partnership interest.

10. On March 1, 1946, Richard S. Goldman committed suicide. On March 26, 1946, Richard N. Goldman, his son, was appointed the executor of his estate and on that day qualified as such.

11. On April 5, 1946, in a proceeding designated "In the Matter of the Irrevocable Trust of Lois E. Senderman, Beneficiary, and Lois J. Senderman, Donor and Trustor, and Richard S. Goldman, Trustee" a petition was filed by the executor of the estate of Richard S. Goldman with the Superior Court of the State of California in and for the City and County of San Francisco (hereinafter referred to as the Superior Court) for the appointment of a successor trustee or trustees in place of the deceased trustee. A true and correct copy of said petition is attached hereto and incorporated

by reference herein as Exhibit 4-D. [To avoid duplication of the record, the Trust Exhibit A to said Exhibit 4-D is not attached hereto, as it is already incorporated into this Stipulation as Exhibit 2-B.]

12. On April 5, 1946, said Court issued its order appointing Clarissa Shortall as successor trustee in place of the deceased trustee. A true and correct copy of said order is attached hereto and incorporated by reference herein as Exhibit 5-E.

13. On May 2, 1946, a petition was filed in the Superior Court by the executor of the estate of said Richard S. Goldman for the appointment of a guardian of the Estate of said Lois E. Senderman. A true and correct copy of said petition is attached hereto and incorporated by reference herein as Exhibit 6-F.

14. On May 2, 1946, said Court issued its order appointing Clarissa Shortall as guardian of the Estate of said Lois E. Senderman. A true and correct copy of said order appointing guardian is attached hereto and incorporated by reference herein as Exhibit 7-G. A true and correct copy of the letters of guardianship issued to Clarissa Shortall on May 2, 1946 is attached hereto and incorporated by reference herein as Exhibit 8-H.

15. On or about April 22, 1947, a petition was filed with the Superior Court by Clarissa Shortall as the guardian of the estate of Lois E. Senderman for instructions. A true and correct copy of said petition is attached hereto and incorporated by reference herein as Exhibit 9-I. On or about June 23, 1947, an amended petition for instruc-

tions was filed with the Superior Court by said Clarissa Shortall as said guardian. A true and correct copy of said amended petition is attached hereto and incorporated by reference herein as Exhibit 10-J. (The exhibits to said petition and to said amended petition are not attached to said copies for the reason that they are incorporated as exhibits into this stipulation. The declaration of trust, Exhibit A to said petition and to said amended petition is Exhibit 2-B hereto; the petition for appointment of successor trustee or trustees in place of deceased trustee, Exhibit B to said petition and to said amended petition, and the order appointing successor trustee in place of deceased trustee, also Exhibit B to said petition and to said amended petition, are Exhibits 4-D and 5-E hereto; the order appointing guardian, Exhibit C to said petition and to said amended petition is Exhibit 7-G hereto.)

16. On July 10, 1947, a hearing was held before the Honorable T. I. Fitzpatrick, Judge of the Superior Court on said amended petition, and evidence both oral and documentary was offered. Clarissa Shortall as guardian appeared in person and by her attorney, and Lois J. Newman appeared in person and by her attorney. The Court issued its order pursuant to said amended petition. A true and correct copy thereof is attached hereto and incorporated by reference herein as Exhibit 11-K.

17. On or about June 24, 1947, the petitioner filed a Federal gift tax return for the calendar year 1946 with the Collector of Internal Revenue for

the First District of California at San Francisco, California. A true and correct copy of said return is attached hereto and incorporated by reference herein as Exhibit 12-L.

18. For the calendar year 1943 and for all subsequent years, the trust for Lois E. Senderman (up to the time of its termination) and/or the minor reported the entire income (before Revenue Agent's adjustments) from said 800 shares of Aztec Brewing Company and from the partnership which replaced said corporation (as described in paragraph 9 of this stipulation) and from the other investments which were purchased with the income from said 800 shares and with the distributions from said partnership in their respective Federal and State of California income tax returns. Neither said trust nor said minor reported any income for any of the calendar years 1943 to 1946, inclusive, other than the income referred to in the preceding sentence. No part of the aforesaid income was reported by petitioner in her Federal or State of California income tax returns for the calendar year 1943 or for any subsequent year. Said trust and/or said minor filed their Federal income tax returns for each of the calendar years 1943 to 1945, inclusive, on or before their respective due dates with the Collector of Internal Revenue for the First District of California at San Francisco, California and duly paid to said Collector the taxes, if any, shown to be due on each of said returns. For the calendar years 1943, 1944 and 1945, said minor or

said trust reported on their Federal income tax returns and paid the amount of taxes shown below:

Calender Year	Taxpayer	Tax
1943	Lois E. Senderman, a minor	$ 3,285.48
1944	Lois E. Senderman, a minor	6,776.42
1945	Lois E. Senderman Trust	52,701.57

19. The petitioner and said minor, during the calendar year 1943 and during all subsequent years, were on a calendar year cash basis for Federal and State of California income tax purposes. The trust for said minor during the calendar year 1943 and during all subsequent years until its termination in 1946 was on a calendar year cash basis for Federal and State of California income tax purposes.

20. By means of letters of the type commonly known as 30-day letters, addressed to said Trust and to said minor, both of which are dated August 25, 1949, the Internal Revenue Agent in Charge, San Francisco Division, has proposed overassessments in income tax in favor of said Trust and of said minor as follows:

Calendar Year	Taxpayer	Amount of Proposed Overassessment
1943	Lois E. Senderman, a minor	$ 3,285.48
1944	Lois E. Senderman, a minor	6,776.42
1945	Lois E. Senderman Trust	52,701.57

On March 3, 1950, said trust and said minor filed protests with the Bureau of Internal Revenue against said overassessments. No part of any of said proposed overassessments nor any interest thereon has been received by said trust or by said minor nor has any part thereof been scheduled for refund to said trust or said minor.

21. The Commissioner, by means of a notice of deficiency dated January 23, 1951, determined deficiencies in income tax against the petitioner for the calendar years 1943 to 1947, as follows:

Year	Deficiency
1943	$ 7,575.67
1944	43,486.63
1945	63,164.93
1946	102,072.23
1947	28,084.93

Said deficiencies are based mainly, and said overassessments referred to in the preceding paragraph are based wholly, upon including in petitioner's income all of the income reported by said trust and by said minor during the calendar years 1943 to 1947, inclusive (except that the deficiency for 1944 is based upon an addition to the petitioner's income of approximately $78,000.00 of which approximately $20,000.00 represents income reported by said minor). The amount of the deficiency determined against petitioner for each of said years which is attributable to inclusion in petitioner's income of all of the income reported by said trust and by said minor is in excess of the amount of the overassessment proposed in favor of said trust or said minor for the same calendar year. The petitioner on April 9, 1951 filed a petition with The Tax Court of the United States, Docket No. 33431, alleging that the deficiencies were erroneously asserted and alleging that the inclusion of the income of said trust and said minor in petitioner's income for each of said calendar

years is erroneous. Said proceeding is now pending before this Court. No trial date has as yet been set for said proceeding.

22. The fair market value of the "8% interest as a limited partner of Aztec Brewing Company, a limited partnership" which the respondent includes, on page 2 of the notice of deficiency, Exhibit A to the petition in this case, as a portion of an alleged taxable transfer on May 2, 1946 (although petitioner denies that there was any gift of any sort on said date or at any other time in the calendar year 1946) was $151,051.09 at all times during the calendar year 1946.

Dated: San Francisco, California, November 2, 1951.

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner.

/s/ CHARLES OLIPHANT,
Chief Counsel,
Bureau of Internal Revenue.
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Nov. 2, 1951.

9-23-01 1/89

TREASURY DEPARTMENT
Internal Revenue Service
(Revised November 1943)

UNITED STATES

EXAMINED GIFT TAX RETURN

CALENDAR YEAR 19[illegible]

(To be filed in duplicate with the Collector of Internal Revenue for the donor's [illegible] than the 15th day of March following the close of the calendar year.)

(Space for use of Collector)
RECEIVED

ESTATE TAX DIVISION MAY -10 1940 SAN FRANCISCO CALIF.

MAR 13 1944 COLLECTOR OF INT. REV. FIRST DIST. CALIF.

DONOR Lois J. Senderman
(Given name) (Middle name or initial) (Surname)

ADDRESS c/o Richard S. Goldman, 1111 Mills Tower, San Francisco, Calif.

CITIZENSHIP American

RESIDENCE 975 Bush Street, San Francisco,

Have you (the donor) during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding $3,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No.")

1. By the creation of a trust (...yes) or the making of additions to a trust previously created (...no), in either case for the benefit of a person or persons other than yourself, and with respect to which you retain no power to revest the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously created trust (...no).

2. By permitting a beneficiary, other than yourself, to receive the income from a trust created by you and with respect to which you retained the power to revest the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits (...no).

3. By the purchase of a life insurance policy (...no) or the payment of a premium on a previously issued policy (...no), the proceeds of which are in either case payable to a beneficiary other than your estate, and with respect to which you retained no power to revest the economic benefits in yourself or your estate or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously issued policy (...no).

4. By permitting another to withdraw funds from a joint bank account which were deposited by you (...no).

5. By conveying title to another and yourself as joint tenants or to yourself and husband or wife as tenants by the entirety (...no).

6. By the exercise or release of a power of appointment, except as provided in subparagraphs 1 and 2 of section 8 of the instructions (...no).

7. By conveying community property to another, or by converting community property into separate property of your spouse or into a tenancy by the entirety of yourself and spouse (or other similar ownership), to the extent of your interest as prescribed by the rule set forth in section 9 of the instructions (...no).

8. By any other method, direct or indirect (...no).

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A.

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total included amount of gifts for year (item e, schedule A)		$ 27,000.00
2. Total deductions for charitable, public, and similar gifts for year (item e, schedule B)	$	
3. Specific exemption claimed (see section 11 of instructions)	30,000.00	
4. Total deductions (item 2 plus item 3)		30,000.00
5. Amount of net gifts for year (item 1 minus item 4)		$ none

COMPUTATION OF TAX (see section 15 of instructions)

1. Amount of net gifts for year (item 5, above)		$ none
2. Total amount of net gifts for preceding years (item e, schedule C)		
3. Total net gifts (item 1 plus item 2)		$ none
4. Tax computed on item 3		none
Tax computed on item 2		
Tax on net gifts for year (item 4 minus item 5)		$ none

RECORD

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

NOTARIAL SEAL

Sworn to and subscribed before me this 14th day of March, 19 44

Louis Wiener
(Signature and title of officer administering oath)

Lois J. Senderman
(Signature of donor)

c/o Richard S. Goldman
1111 Mills Tower, San Francisco
(Address of person filing return)

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that I prepared this return for the person named herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete statement of all the information respecting the donor's gift tax liability of which I have any knowledge.

NOTARIAL SEAL

Sworn to and subscribed before me this 14th day of MARCH, 19 44

Louis Wiener NOTARY PUBLIC
(Signature and title of officer administering oath)

Louis N. Bahl
(Signature of person preparing return)

Kahl Bldg. San Francisco
(Address of person preparing return)

Supplemental information submitted by taxpayer

EX. 1-A

Exhibit No. 1-A—(Continued)

SCHEDULE A—Total Gifts During Year (see sections 5, 6, 7, 8, 9, 10, 12, and 16 of instructions)

Item No. 1. Description of Gift, and Donee's Name and Address; Date of Gift 1/1/43

	Value at Date of Gift
Donee: Lois E. Senderman (donor's daughter)	$30,000.00
[Written in longhand]: O.K. G.E.B.	
800 shares Aztec Brewing Company, 2201 Main Street, San Diego, California, incorporated under the laws of the State of California. Said shares stand in the name of Richard S. Goldman, 1111 Mills Tower, San Francisco, California, in trust for donee. Aztec Brewing Company is not listed on any Exchange, nor has it any market value as no sales of stock have been made since its incorporation.	
(a) Total	$30,000.00
(b) Less Total exclusions not exceeding $3,000 for each donee (except gifts of future interests)	3,000.00
(c) Total included amount of gifts for year	$27,000.00

SCHEDULE B—Deductions for Charitable, Public, and Similar Gifts During Year (see sections 10 and 13 of instructions)

None.

SCHEDULE C—Returns, Amounts of Specific Exemption, and Net Gifts for Preceding Years (subsequent to June 6, 1932)

None.

* * * * *

EXHIBIT No. 2-B

The undersigned, Richard S. Goldman, does hereby acknowledge that he has in his possession the following certificates of the capital stock of Aztec Brewing Company, a corporation, to wit: Certificate No. 12 for 2,394⅞ shares standing in the name of Richard S. Goldman, Trustee for Lois Senderman; Certificate No. 13 for 1 share standing in the name of Philip Storer Thacher; and Certificate No. 18 for 1 share standing in the name of L. J. Senderman, and that he holds all of said certificates of stock as trustee and that the beneficial owners of said stock are Lois J. Senderman owner of 1596⅞ shares and Lois E. Senderman, a minor, daughter of Lois J. Senderman, owner of 800 shares.

Said Trustee agrees to hold said 800 shares of the capital stock of Aztec Brewing Company, a corporation, and any other property, real or personal, which said Lois E. Senderman may hereafter deposit with him, upon the following terms and conditions:

(1) To collect the income therefrom and to invest and reinvest the corpus and income, or any portion thereof as may, in his judgment, be for the best interest of the beneficiary, to pay any expenses in connection with the management and control of said trust property, including a reasonable sum for his services as Trustee and to distribute to the beneficiary of this trust the whole or such portions of the income of said trust estate as may from time to time, in the sole and uncontrolled discretion of the

Exhibit No. 2-B—(Continued)

Trustee, be for the best interest of the beneficiary. For this purpose the Trustee may, if the income is not sufficient, distribute any portion of the corpus.

(2) Said Trustee agrees to transfer and deliver to any duly appointed Guardian of the estate of Lois E. Senderman, a minor, all of the corpus and accumulated income of the trust estate, and in the event that no such Guardian is appointed the Trustee will deliver to Lois E. Senderman upon her reaching the age of 21 years all of the property of said trustee estate then remaining in his hands. If said Lois E. Senderman shall die prior to her reaching the age of 21 years said Trustee undertakes and agrees to deliver to the personal representative of said Lois E. Senderman any portion of the corpus or accumulated income of said trust estate.

(3) The Trustee may resign and discharge himself of the trust created hereunder by causing the property which he holds as Trustee to be transferred into the name of the duly appointed Guardian of said Lois E. Senderman, a minor. In the event of the death of the Trustee while this trust shall remain in force and effect his executors, administrators or heirs at law as the case may be, are hereby directed and empowered to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such Guardian has been appointed the executors, ad-

Exhibit No. 2-B—(Continued)

ministrators or heirs at law of said deceased Trustee shall apply to a Court of competent jurisdiction for the appointment of a Guardian to whom such property can be conveyed.

(4) Trustee will render annually on a calendar year basis a full and competent statement of all moneys and property received and disbursed during the calendar year and shall file such reports and execute such documents as may be necessary in connection with the handling of said trust estate.

(5) Trustee shall have no obligation whatsoever with respect to any of the property held hereunder, except as is expressly provided for herein, and trustee shall not be responsible for any losses incurred or errors in judgment unless the same are the result of wilful negligence. Upon the termination of his liability as Trustee, Trustee shall before distributing the property herein referred to reimburse himself for any and all expenses and charges of any kind or character incurred by him in connection with the administration of this trust which have not been previously paid, and shall withhold such portion of the property as may be necessary for the payment of any contingent obligation or obligations, the exact amount of which have not been determined. Upon the complete payment of all obligations any balance remaining in the hands of the Trustee shall be paid and delivered to said Lois E. Senderman, a minor, or if she has arrived at the age of majority then to said Lois E. Senderman.

Exhibit No. 2-B—(Continued)

In witness whereof, I have hereunto set my hand this first day of January, 1943.

RICHARD S. GOLDMAN.

I, Lois J. Senderman, individually and as the mother and guardian of Lois E. Senderman, a minor, do hereby acknowledge receipt of the instrument of which the foregoing is a carbon copy and do hereby accept the same and agree to be bound thereby.

Dated: January 1, 1943.

LOIS J. SENDERMAN,
Mother and Guardian of Lois E. Senderman, a minor.

I, Richard S. Goldman, do hereby certify that I am the person named in the attached document as Trustee. That I have in my possession a duplicate original of the within instrument. That I have compared the attached copy with the said original and that the same is full, true and correct in all respects.

Dated: April 25th, 1944.

/s/ RICHARD S. GOLDMAN.

EXHIBIT No. 3-C

CERTIFICATE OF LIMITED PARTNERSHIP

Know all men by these presents:

That we, the undersigned, have this day agreed to and hereby do form a limited partnership under the laws of California.

And we hereby certify:

I. Name

That the name of said limited partnership is: Aztec Brewing Company.

II. Purpose

That the purposes for which this limited partnership is formed are:

To carry on the business of brewers, distillers and manufacturers of, and merchants and dealers in beer and near-beer, and of casks, bottles, and other receptacles for the same, and of malt, hops, grain, meal, yeast, and all other materials and things capable of being used in connection with any such business or manufacture, to own any and all real estate necessary for the proper conduct of the business of the partnership; to borrow money with the consent or approval of the general partners; and to do any and all things necessary or advisable to carry out the above purposes.

III. Principal Office

The principal office for the transaction of the business of said partnership is to be located at 2301 Main Street in the City of San Diego, Zone 12, State of California.

Exhibit No. 3-C—(Continued)

IV. Partners

The name and place of residence of each member of the partnership, together with a designation showing whether each member is a general or limited partner, is as follows:

Name	Address	Whether General or Limited Partner
E. P. Baker	4411 Conde Pl., San Diego, Calif.	General
James N. Crofton	Keene,California	General
Loretta Crofton	Keene, California	Limited
Vera F. Crofton	1115 Holly Ave., Arcadia, Calif.	Limited
R. S. Goldman as Trustee for Lois J. Senderman	1111 Mills Tower San Francisco, Calif.	Limited
E. H. Crofton	Chula Vista, Calif.	Limited
Alva Crofton	Chula Vista, Calif.	Limited
H. D. Cates	Chula Vista, Calif.	Limited
Tina Cates	Chula Vista, Calif.	Limited
Mrs. E. P. Baker	4411 Conde Pl., San Diego, Calif.	Limited
R. S. Goldman as Trustee for Lois E. Senderman	1111 Mills Tower San Francisco, Calif.	Limited

V. Term of Partnership

Unless terminated sooner under the provisions hereof, the term for which the partnership is to exist is the period from the actual date the partnership begins business until the close of business on January 31, 1945, and thereafter from year to year, but at any time any of the general or limited partners owning 50% or more of the partnership interests may deliver to the then principal office of the partnership a written notice that they desire the partnership to terminate at the close of business one month thereafter in which event the partnership shall terminate at the time so designated.

Exhibit No. 3-C—(Continued)

VI. Capital Contributions of Partners

The capital contributions of the general and limited partners shall be cash and/or other property, as hereinafter set forth. Said capital contributions of said general and limited partners and the share of each in the profits and losses of the partnership shall be as follows:

Name	Capital Contribution	Share in Profits	Share in Losses
E. P. Baker, general partner	$ 93,750.00	12½%	12½%
James N. Crofton, gen. partner	225,000.00	30%	30%
Mrs. E. P. Baker, limited partner	93,750.00	12½%	12½%
Vera F. Crofton, limited partner	75,000.00	10%	10%
Loretta Crofton, limited partner	25,000.00	3–1/3%	3–1/3%
Richard S. Goldman, Trustee for Lois J. Senderman, limited partner	127,500.00	17%	17%
Richard S. Goldman,Trustee for Lois E. Senderman, limited partner	60,000.00	8%	8%
E. H. Crofton, limited partner	13,750.00	1–5/6%	1–5/6%
Alva Crofton, limited partner	11,250.00	1½%	1½%
H. D. Cates, limited partner	13,750.00	1–5/6%	1–5/6%
Tina Cates, limited partner	11,250.00	1½%	1½%
Total	$750,000.00	100%	100%

The general and limited partners listed above own all of Aztec Brewing Company, a California corporation, hereinafter referred to as "Corporation," in the same proportion as they own interests in the within partnership. Said corporation is in process of dissolution and liquidation and said partners as said stockholders, are now or will presently be, entitled to receive as a first liquidating dividend

Exhibit No. 3-C—(Continued)

from said corporation, the following described property:

1. All real estate owned by said corporation on the date of said first liquidating dividend;

2. All furniture and fixtures owned by said corporation on the date of said first liquidating dividend;

3. All brewing, bottling delivery and other equipment owned by said corporation on the date of said first liquidating dividend;

4. All bottles, cans, barrels, cases, cartons, packages, containers, labels, crowns, stamps, office supplies and advertising matter owned by said corporation on the date of said first liquidating dividend;

5. All unexpired insurance policies owned by said corporation on the date of said first liquidating dividend;

6. The entire finished stock of beer and/or other beverages owned by said corporation on the date of said first liquidating dividend;

7. All beer and other beverages in storage and/or process of manufacture and owned by said corporation on the date of said first liquidating dividend;

8. All trade marks owned by said corporation on the date of said first liquidating dividend;

9. All or such portion of the malt, hops, rice, sugar, and other raw materials usable in and for the manufacture of beer and/or other beverages and owned by said corporation on said date of said first liquidating dividend, the book value of which, on the books of account of said corporation, when

Exhibit No. 3-C—(Continued)

added to the book values of the items 1 to 8, inclusive, make a total book value of $750,000.00 for items 1 to 9, inclusive;

10. Should said aggregate book values of items 1 to 9, inclusive, be less than $750,000.00, than an amount of cash which, when added to the aggregate book value of items 1 to 9, inclusive, makes a total book value of $750,000.00.

Said general and limited partners, and each of them, hereby agree to and do contribute, convey and transfer to this partnership their respective interests in and to said property to be so received as aforesaid as their respective capital contributions to this partnership. Said partners, and each of them, hereby agree to execute any and all documents, and do any and all things, necessary to contribute, convey and transfer to this partnership all of said property.

VII. Books of Account

True, just and correct books of account shall be kept by the general partners in which there shall be entered all the transactions of or relating to the partnership or its business.

The books of account shall be kept at the principal place of business of the partnership and shall be open to inspection at all reasonable times by any and all general or limited partners.

Any general partner shall have the right to request an audit of the books by a certified public accountant to be selected by the general partners, the cost of which audit shall be paid by the partner-

Exhibit No. 3-C—(Continued)

ship and charged as an expense upon its books of account.

The books of account of the partnership shall be kept on the basis of a fiscal year beginning on the first day of February, 1944, and ending on the last day of January, 1945.

VIII. General Manager

Mr. E. P. Baker, one of the general partners herein named, shall be the general manager of the business of the partnership. He shall not borrow any money, sell any substantial portion of the plant and operating assets of the partnership, nor purchase any other business or plant, without the consent of all general partners. Mr. Baker shall be paid a salary of $25,000.00 per year and he shall be given an expense allowance of $3,600.00 per year, all of which salary and expense allowance shall be treated as an expense of the business in the ascertainment of profits for distribution among the partners.

Mr. Baker shall remain as general manager until or unless he dies, resigns, becomes physically unable to perform the duties of general manager or is removed as general manager by a written notification executed by general and/or limited partners owning at least 60% interest in the partnership. Upon the death, resignation, incapacity or removal of Mr. Baker, the assistant general manager, to be selected as hereafter provided, shall be and become acting general manager for a period of sixty

Exhibit No. 3-C—(Continued)

(60) days thereafter. During said sixty (60) day period a new general manager shall be appointed by an instrument in writing signed by general or limited partners owning at least 60% of the partnership. Should no new general manager be appointed during such 60 day period, the assistant general manager shall continue to function as acting general manager until a new general manager is so appointed. Immediately after the business of the partnership is commenced, Mr. Baker shall appoint F. M. Brick as assistant general manager. Such assistant general manager may be removed and a new assistant manager appointed, at any time by the general partners.

IX. Termination By Death or Disability of General Partners.

Notwithstanding the provisions of Paragraph V hereof, this partnership shall terminate upon the death of either of the general partners.

X. Liquidation of Partnership

The dissolution of the partnership shall be carried to completion by the general partners or if one has died, by the surviving general partner and a trustee to be selected in the following manner, to wit: Should E. P. Baker die, then and in such event, R. S. Goldman as trustee for Lois J. Senderman, Mrs. E. P. Baker and R. S. Goldman as trustee for Lois E. Senderman, together with the legal representative of Mr. Baker's estate, shall designate a trustee to act with Mr. Crofton in

Exhibit No. 3-C—(Continued)

the dissolution of the partnership. Should James N. Crofton die, then and in such event, Loretta Crofton, Vera F. Crofton, E. H. Crofton, Alva Crofton, H. D. Cates, Tina Cates and the legal representative of Mr. Crofton's estate shall designate the trustee to act with Mr. Baker in the dissolution of the partnership.

XI. Assignment of Interest of Limited Partner

The limited partners may not assign their respective interests in the partnership except as follows: R. S. Goldman as trustee for Lois J. Senderman, Mrs. E. P. Baker, and R. S. Goldman as trustee for Lois E. Senderman shall not assign their respective interests in the partnership to anyone other than E. P. Baker and/or the remaining limited partners above named which for convenience are herein designated as the "Baker-Jaffe group" without first giving said E. P. Baker and/or the remaining limited partners in said group the option to purchase such interest at the fair market value thereof, exclusive of good will. Loretta Crofton, Vera F. Crofton, E. H. Crofton, Alva Crofton, H. D. Cates and Tina Cates shall not assign their respective interests in the partnership to anyone other than James N. Crofton and/or the remaining limited partners above named which for convenience are herein designated as the "Crofton group" without first giving to said James N. Crofton and/or the remaining limited partners in said Crofton group the option to purchase such interest

Exhibit No. 3-C—(Continued)

at the fair market value thereof, exclusive of good will. Should the parties be unable to agree upon such fair market value, then and in such event, the same shall be determined by a board of arbitrators, one to be selected by the seller, one by the purchasers, and the third by these two. Should the purchasers be unwilling to proceed with the purchase of the interest of the limited partner at the purchase price fixed by such board of arbitration, then and in such event, such interest shall be offered to the members of the opposite group and should such members be unwilling to purchase at said price, then said interest may be sold to outsiders.

XII. Death of Limited Partner

In the event of the death of any limited partner, his estate may continue as a limited partner but in the event that his estate, or his heirs and legatees do not desire to continue in the partnership, the surviving partners of the decedent's group shall have the right to buy the deceased partner's interest, and if such surviving partners of the decedent's group do not wish to make such purchase, the partners of the other group shall have the right to buy the deceased partner's interest, at its market value at the date of death. In computing such market value the good will, if any, of the partnership shall be considered or treated as having no value. Should the parties be unable to agree upon such value, the same shall be fixed by a board

Exhibit No. 3-C—(Continued)

of arbitrators, one to be selected by the deceased limited partner's legal representative, one by the purchasing partners, and the third by these two. Should said surviving partners elect to purchase the interest of the deceased partner as aforesaid, said purchase price shall be payable fifty per cent (50%) on the finding of value by the arbitrators and the balance is not to exceed three (3) yearly installments together with interest at four per cent (4%) per annum from said date of death. If no partner wishes to so purchase the deceased limited partner's interest, his or her estate may sell it to any outsider.

XIII. Bonds of General Partners

Each general partner shall furnish the partnership with a fidelity bond in the amount of $100,000.00, the cost of which bonds shall be paid by the partnership.

XIV. Distribution of Profits

The profits or gains of the partnership shall be distributed at least quarterly to the partners, but in arriving at such net profits, there shall be maintained the usual reserves as are called for by proper accounting methods and no distribution shall be made which will leave a cash balance on hand of less than $150,000.00.

XV. Cooperation Between General Partners

Notwithstanding the fact that Mr. E. P. Baker

Exhibit No. 3-C—(Continued)

is the general manager, he shall consult and counsel with the other general partner at all times and such general partner shall have the right to obtain any desired information directly from any and all heads of the departments of the partnership.

XVI. Checks

All checks drawn on the partnership bank account or accounts shall be signed by the general partners and/or their nominees.

In Witness Whereof, we have hereunto set our hands this 24th day of February, 1944.

/s/ E. P. BAKER
/s/ JAMES N. CROFTON
/s/ LORETTA CROFTON
/s/ VERA F. CROFTON
/s/ R. S. GOLDMAN
as Trustee for Lois J. Senderman

/s/ E. H. CROFTON
/s/ ALVA CROFTON
/s/ H. D. CATES
/s/ TINA CATES
/s/ MRS. E. P. BAKER
/s/ R. S. GOLDMAN
as Trustee for Lois E. Senderman.

State of California,
County of San Diego—ss.

James N. Crofton, Vera F. Crofton, Loretta Crofton and H. D. Cates, each for himself or her-

Exhibit No. 3-C—(Continued)

self being first duly sworn upon oath, deposes and says:

That he or she has read the above and foregoing Certificate of Limited Partnership and that he or she knows the contents thereof and that he or she knows the same to be true of his or her own knowledge; that he or she executed the same of his or her own free will and accord and upon the consideration stated therein.

/s/ JAMES N. CROFTON
/s/ VERA F. CROFTON
/s/ LORETTA CROFTON
/s/ H. D. CATES

Subscribed and sworn to before me this 24th day of February, 1944.

/s/ JOSEPHINE IRVING
Notary Public in and for the County of San Diego, State of California.

State of California,
County of San Diego—ss.

E. P. Baker and Mrs. E. P. Baker, each for himself or herself being first duly sworn upon oath, deposes and says:

That he or she has read the above and foregoing Certificate of Limited Partnership and that he or she knows the contents thereof and that he or she knows the same to be true of his or her own knowl-

Exhibit No. 3-C—(Continued)

edge; that he or she executed the same of his or her own free will and accord and upon the consideration stated therein.

/s/ E. P. BAKER
/s/ MRS. E. P. BAKER

Subscribed and sworn to before me this 24th day of February, 1944.

/s/ F. M. BRICK
Notary Public in and for the County of San Diego, State of California. My commission expires April 14, 1945.

State of California,
City and County of San Francisco—ss.

R. S. Goldman, as Trustee for Lois J. Senderman, and as Trustee for Lois E. Senderman, being first duly sworn upon oath, deposes and says:

That he has read the above and foregoing Certificate of Limited Partnership and that he knows the contents thereof and that he knows the same to be true of his own knowledge; that he executed the same of his own free will and accord and upon the consideration stated therein.

/s/ R. S. GOLDMAN,
As Trustee for Lois J. Senderman

/s/ R. S. GOLDMAN,
As Trustee for Lois E. Senderman

Exhibit No. 3-C—(Continued)

Subscribed and sworn to before me this 26th day of February, 1944.

/s/ LOUIS WIENER,
Notary Public in and for said County and State.

State of California,
County of San Diego—ss.

E. H. Crofton, Alva Crofton and Tina Cates, each for himself or herself being first duly sworn upon oath, deposes and says:

That he or she has read the above and foregoing Certificate of Limited Partnership and that he or she knows the contents thereof and that he or she knows the same to be true of his or her own knowledge; that he or she executed the same of his or her own free will and accord and upon the consideration stated therein.

/s/ E. H. CROFTON
/s/ ALVA CROFTON
/s/ TINA CATES

Subscribed and sworn to before me this 29th day of February, 1944.

/s/ FRANK A. FRYE, JR.
Notary Public in and for the County of San Diego, State of California.

EXHIBIT No. 4-D

In the Superior Court of the State of California
In and for the City and County
of San Francisco

No. 351814

In the Matter of the Irrevocable Trust of Lois E. Senderman, Beneficiary, and Lois J. Senderman, Donor and Trustor, and Richard S. Goldman, Trustee.

PETITION FOR APPOINTMENT OF SUCCESSOR TRUSTEE OR TRUSTEES IN PLACE OF DECEASED TRUSTEE.

To the Honorable, the Superior Court of the State of California in and for the City and County of San Francisco:

The petition of Richard N. Goldman respectfully shows:

I.

That on the 1st day of January, 1943 Lois J. Senderman, as trustor and donor, and Richard S. Goldman, as trustee, executed a trust indenture wherein and whereby according to the terms of said trust indenture certain properties were irrevocably donated and placed in trust for the use and benefit of Lois E. Senderman, a minor; that a true and correct copy of said trust indenture is attached hereto and marked Exhibit "A":

That Lois E. Senderman, the said beneficiary, is now approximately of the age of eleven (11) years.

Exhibit No. 4-D—(Continued)

II.

That said Richard S. Goldman, the trustee named in said trust indenture, died on the 1st day of March, 1946.

III.

That the said trust indenture does not provide a practical method of appointing a trustee to fill the vacancy created by the death of Richard S. Goldman.

That a judicial designation and appointment of a successor trustee or trustees is necessary in order to facilitate the administration of said trust by such trustee or trustees.

That the trust estate of said beneficiary may suffer loss if an immediate appointment is not made.

That in a proceeding entitled "In the Superior Court of the State of California in and for the City and County of San Francisco, In the Matter of the Estate of Richard S. Goldman, deceased" and numbered therein 102461, Richard N. Goldman, your petitioner was on March 26, 1946 appointed the executor of the last will and testament of Richard S. Goldman, deceased, and thereafter, and on said day, qualified as such and has ever since been and now is the duly qualified and acting executor.

That other than your petitioner and the Estate of Richard S. Goldman, deceased, and said minor there are no persons interested in said trust.

Exhibit No. 4-D—(Continued)

IV.

That your petitioner respectfully suggests that Clarissa Shortall be appointed as trustee or trustees and that the same have consented to act as such.

Wherefore, your petitioner prays that this court appoint the person or persons suggested and designated in the foregoing paragraph IV thereof as trustee or trustees of said trust to fill the vacancy created by the death of Richard S. Goldman, and for such further order or orders as may be meet and proper in the premises.

/s/ CLARISSA SHORTALL,
Attorney for Petitioner.

State of California,
City and County of San Francisco—ss.

Richard N. Goldman, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief and that as to those matters he believes it to be true.

RICHARD N. GOLDMAN

Exhibit No. 4-D—(Continued)

Subscribed and sworn to before me this 5th day of April, 1946.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

The undersigned hereby requests that the prayer of the above petition be granted without further notice.

LOIS J. NEWMAN

Mother and natural guardian of the said Lois E. Senderman, the minor beneficiary.

Subscribed and sworn to before me this 5th day of April, 1946.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

The undersigned hereby consents to act as such successor trustee.

CLARISSA SHORTALL

[Endorsed]: Filed April 5, 1946. H. A. van der Zee, Clerk.

EXHIBIT No. 5-E

[Title of Superior Court and Cause No. 351814.]

ORDER APPOINTING SUCCESSOR TRUSTEE IN PLACE OF DECEASED TRUSTEE

On the application and upon reading and filing the petition of Richard N. Goldman, and it further appearing to the court above-entitled that all of the allegations of said petition are true, and that all parties interested in the above designated trust have each in writing consented thereto and that the giving of further notice hereof is unnecessary and useless, and that it is necessary for the immediate and proper administration of said trust:

Now, Therefore, it is Ordered, Adjudged and Decreed that Clarissa Shortall be and she is hereby appointed as the successor trustee to fill the vacancy in said trusteeship caused by the death of Richard S. Goldman, and in place of said Richard S. Goldman, deceased.

Dated: April 5, 1946.

EDWARD P. MURPHY,
Judge of the Superior Court.

EXHIBIT No. 6-F

In the Superior Court of the State of California
in and for the City and County
of San Francisco

No. 103176

In the Matter of the Estate and Guardianship of
LOIS E. SENDERMAN, a minor.

PETITION FOR APPOINTMENT OF
GUARDIAN OF MINOR

To the Honorable, the Superior Court of the State of California in and for the City and County of San Francisco:

The petition of Richard N. Goldman as executor of the estate of Richard S. Goldman, deceased, respectfully represents:

That your petitioner is a resident of the City and County of San Francisco, State of California; that on the 26th day of March, 1946 in that certain proceeding in the Superior Court of the State of California in and for the City and County of San Francisco, entitled In the Matter of the Estate of Richard S. Goldman, deceased, No. 102461 thereof, the last will and testament of Richard S. Goldman, deceased, was duly and regularly admitted to probate in which said last will and testament your petitioner was named executor and thereupon qualified as said executor and on said date was duly and regularly appointed and ever since has been and

Exhibit No. 6-F—(Continued)

now is the executor of the last will and testament of Richard S. Goldman, deceased.

That Lois E. Senderman is a minor of the age of eleven years residing in the City and County of San Francisco, State of California.

That the names and addresses of the parents of said minor child are as follows:

Father: Aaron Senderman—1908A Baker Street, San Francisco, California.

Mother: Lois J. Newman—Mayflower Hotel, San Francisco, California.

That the said minor has no guardian legally appointed by will or otherwise and has estate which needs the care and attention of some fit and proper person; that the property of said estate consists of personal property, the exact nature and description of which is unknown at this time.

That on the 1st day of January, 1943 Richard S. Goldman as trustee executed a trust indenture which said trust was in full force and effect at the time of the death of said Richard S. Goldman, and wherein and whereby according to the terms of said trust indenture certain properties were declared and placed in trust for the use and benefit of Lois E. Sanderman, the above-named minor. Paragraph III of said trust indenture reads as follows:

"In the event of the death of the Trustee while this trust shall remain in force and effect, his executors, administrators or heirs at law as the case may be, are hereby directed and empowered

Exhibit No. 6-F—(Continued)

to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such guardian has been appointed the executors, administrators or heirs at law of said deceased Trustee shall apply to a court of competent jurisdiction for the appointment of a guardian to whom such property can be conveyed."

That in accordance therewith your petitioner believes that Clarissa Shortall, a resident of the City and County of San Francisco, State of California is a fit and proper person to act as such guardian and therefore your petitioner respectfully requests that said Clarissa Shortall be appointed as such guardian of the estate of Lois E. Senderman, a minor.

Wherefore, your petitioner prays that the said Clarissa Shortall be appointed guardian of the estate of Lois E. Senderman, a minor, and for such other and further order as may be meet and proper in the premises.

RICHARD N. GOLDMAN
Executor of the Estate of Richard S. Goldman, Deceased.

A. B. BIANCHI,
Attorney for Petitioner.

Exhibit No. 6-F—(Continued)

State of California,
City and County of San Francisco—ss.

Richard N. Goldman, being duly sworn, deposes and says: That he is the petitioner named in the foregoing Petition for Appointment of Guardian of Minor; that he has read the same and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

RICHARD N. GOLDMAN

Subscribed and sworn to before me this 29th day of April, 1946.

[Seal] LOUIS WIENER
Notary Public in and for the City and County of San Francisco, State of California.

The undersigned, Aaron Senderman, hereby certifies that he has read the foregoing Petition for the appointment of Clarissa Shortall as guardian of the estate of Lois E. Senderman, a minor; that he is the father of the said minor and that he hereby waives any further notice of the hearing of said Petition.

Dated at San Francisco this 29th day of April, 1946.

AARON SENDERMAN

The undersigned, Lois J. Newman, formerly Lois

Exhibit No. 6-F—(Continued)

J. Senderman, hereby certifies that she has read the foregoing Petition for the appointment of Clarissa Shortall as guardian of the estate of Lois E. Senderman, a minor; that she is the mother of said minor and now has and for sometime has had the sole care and custody of the person of said minor; that she hereby waives any further notice of the hearing of said petition and consents to the granting thereof.

Dated at San Francisco this 29th day of April, 1946.

LOIS J. NEWMAN

Upon reading and filing the foregoing Petition and good cause appearing therefor,

It is hereby ordered that further notice of the hearing thereof be dispensed with.

Dated at San Francisco this 2nd day of May, 1946.

T. I. FITZPATRICK,
Judge of the Superior Court.

[Endorsed]: Filed May 2, 1946.

EXHIBIT No. 7-G

[Title of Superior Court and Cause No. 103176.]

ORDER APPOINTING GUARDIAN

The petition of Richard N. Goldman for the appointment of Clarissa Shortall as guardian of the estate of Lois E. Senderman, a minor, coming on regularly this day for hearing, and upon satis-

Exhibit No. 7-G—(Continued)

factory proof appearing, the Court accordingly finds:

I. That notice of this hearing has been duly and regularly given according to law to Aaron Senderman, whom the Court finds to be the father of said minor, and to Lois J. Newman, whom the Court finds to be the mother of said minor and the person charged with the sole support, care, custody and control of said minor; further notice of said hearing having heretofore been dispensed with by the order of this Court;

II. That the allegations of said petition are true and that Lois E. Senderman is a minor of the age of approximately eleven (11) years and residented in the City and County of San Francisco, State of California;

III. That said minor has no guardian legally appointed by will or otherwise and has an estate which requires the care and attention of some fit and proper person, and that Clarissa Shortall is a fit and proper person to act as such guardian;

IV. That the petitioner, Richard N. Goldman, is the executor of the last will and testament of Richard S. Goldman, deceased; that in a proceeding in the above designated court entitled "In the Matter of the Estate of Richard S. Goldman, Deceased" and numbered therein 102461 he was, on March 26, 1946, duly and regularly appointed and qualified as the executor of the last will and testament of said Richard S. Goldman, deceased, and

Exhibit No. 7-G—(Continued)

is now and ever since has been such duly and regularly qualified and acting executor;

V. That Richard S. Goldman in his lifetime became, was and continued to be up to the time of his death on March 1, 1946, the trustee of a trust created for the benefit of said minor wherein and whereby from approximately the 1st day of January, 1943, he held as such trustee eight hundred (800) shares of the Aztec Brewing Company, a corporation, which same then constituted the bulk of said trust estate of said minor beneficiary; that the said Richard S. Goldman as such trustee for said minor, under date of February 24, 1944, in connection with the dissolution and reorganization of Aztec Brewing Company, a corporation, into a limited partnership doing business under the firm name and style of Aztec Brewing Company which reorganization required the surrender and cancellation of said eight hundred (800) shares in exchange for an interest in the said limited partnership did become a limited partner of said Aztec Brewing Company as such trustee for said minor; and as such trustee for said minor did secure and continue to hold in trust for said minor until the time of his death an eight per cent interest in and to the properties and profits of Aztec Brewing Company, a limited partnership; that the capital contribution credited to the minor's interest in the Articles of Limited Partnership by reason of said exchange was and is Sixty Thousand Dollars ($60,000.00);

Exhibit No. 7-G—(Continued)

VI. That primarily by reason of the foregoing transaction the said trust estate accumulated and grew in value; that at the time of the death of said trustee and now the personal property belonging to the estate of said minor in addition to the said limited partnership interest consists of approximately upwards of One Hundred Fifty Thousand Dollars ($150,000.00) worth of securities and cash; that all of said trust property is on deposit with The Canadian Bank of Commerce (California) save and except the sum of approximately Twenty-five Thousand Dollars ($25,000.00) in cash which is held by Clarissa Shortall as successor trustee of said Richard S. Goldman, deceased; that following the death of said Richard S. Goldman and on April 5, 1946, said Clarissa Shortall was by order of this Court appointed successor trustee in place of said deceased trustee in a proceeding in the Court above designated and entitled "In the Matter of the Irrevocable Trust of Lois E. Senderman, Beneficiary, and Lois J. Senderman, Donor and Trustor, and Richard S. Goldman, Trustee", and numbered therein 351814;

That under date of April 21, 1946 and in order to protect the said investment, Clarissa Shortall, as successor trustee, duly executed and signed new and Amended Articles of Limited Partnership wherein and whereby she became substituted in lieu and stead of said Richard S. Goldman, Trustee for Lois E. Senderman, a minor, a limited partner;

Exhibit No. 7-G—(Continued)

VII. That in and by Paragraph (3) of said trust indenture it is provided as follows:

"(3) The trustee may resign and discharge himself of the trust created hereunder by causing the property which he holds as Trustee to be transferred into the name of the duly appointed Guardian of said Lois E. Senderman, a minor. In the event of the death of the Trustee while this trust shall remain in force and effect his executors, administrators or heirs at law as the case may be, are hereby directed and empowered to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such Guardian has been appointed the executors, administrators or heirs at law of said deceased Trustee shall apply to a Court of competent jurisdiction for the appointment of a Guardian to whom such property can be conveyed."

VIII. That believing that the interests of said minor and her estate and the maintenance of the integrity of the trust investment are best served by a guardian of said minor being substituted in said Articles of Limited Partnership for and in stead of the successor trustee, said successor trustee, Clarissa Shortall, has expressed her desire to resign and discharge herself of the aforesaid trust by causing the property which she holds as trustee to be transferred into her name as the duly ap-

Exhibit No. 7-G—(Continued)

pointed guardian of said Lois E. Senderman, a minor;

That said Clarissa Shortall has expressed in open court her consent to the insertion by the Court in the order of appointment of conditions not otherwise obligatory which do or may impose upon her special duties in connection with the care and custody of said minor's estate;

IX. That it is for the best interest of said minor and her said estate that the guardian continue to remain and/or to become as such a limited partner of Aztec Brewing Company to the same extent as to partnership interest as now prevails.

X. That it is not necessary that said guardian have on hand at any time more than Twenty-five Thousand Dollars ($25,000.00) belonging to said minor's estate; that The Canadian Bank of Commerce (California) has consented to accept for deposit and safe keeping such portion or all of the personal assets of said minor's estate as this Court may deem proper and agreed that all property so deposited with it shall thereupon be held by it under the order and direction of this Court;

That said Canadian Bank of Commerce (California) is a Bank duly qualified to so accept such deposits or deposit under the "Bank Act" of the State of California, Sections 51, 51.1 and 93 thereof;

That as of the date hereof all of the property of this estate is on deposit as required by Sec. 51,

Exhibit No. 7-G—(Continued)

Sec. 51.1 and Sec. 93 of said Bank Act with said Bank, save and except Twenty-five Thousand Dollars ($25,000.00) in cash which is in the custody and possession of Clarissa Shortall, the said successor trustee.

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed as follows:

(a) That the said Clarissa Shortall be and she is hereby appointed guardian of the estate of the said minor, Lois E. Senderman, and that letters of guardianship of the estate of said minor issue to said Clarissa Shortall upon her taking the oath required by law and filing a bond according to law in the sum of Twenty-five Thousand Dollars ($25,000.00) given by a surety company authorized by law to furnish such bond, otherwise said bond to be in the sum of Fifty Thousand Dollars ($50,000.00);

(b) That with the exception of the sum of Twenty-five Thousand Dollars ($25,000.00) all monies and personal assets of the minor ward shall remain on deposit and be deposited forthwith with The Canadian Bank of Commerce (California) in accordance with the provisions of Sections 51, 51.1 and 93 of the "Bank Act" of the State of California, the same to be and remain subject to, and to be withdrawn only upon, the further order of this Court;

(c) That the resignation of Clarissa Shortall as successor trustee as aforesaid be and the same is hereby approved;

Exhibit No. 7-G—(Continued)

(d) That subject to the further order of this Court the said guardian having consented thereto she is hereby directed as a condition of her appointment to remain or become as such guardian a limited partner in said Aztec Brewing Company, a limited partnership and hereby empowered to execute as such guardian any documents which may be necessary to effectuate the continuance, maintenance and integrity of the present interest and investment of said minor in said partnership.

Done in Open Court this 2nd day of May, 1946.

T. I. FITZPATRICK,
Judge of the Superior Court.

[Endorsed]: Filed May 2, 1946.

EXHIBIT No. 8-H

[Title of Superior Court and Cause 103176.]

LETTERS OF GUARDIANSHIP

State of California,
City and County of San Francisco—ss.

Clarissa Shortall is hereby appointed Guardian of the Estate of Lois E. Senderman, a minor.

Witness, H. A. van der Zee, Clerk of the Superior Court of the State of California in and for

Exhibit No. 8-H—(Continued)

the City and County of San Francisco, with the Seal of said Court affixed.

Dated May 2, 1946.

By order of the Court,

[Seal] H. A. VAN DER ZEE,
Clerk.

/s/ By LUTHER DOBSON,
Deputy Clerk.

State of California,
City and County of San Francisco—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California; and that I will faithfully discharge the duties of Guardian of the Estate of the above named ward, according to law.

CLARISSA SHORTALL

Subscribed and sworn to before me May 2, 1946.

/s/ LUTHER DOBSON,
Deputy County Clerk.

[Endorsed]: Filed May 2, 1946.

EXHIBIT No. 9-I

[Title of Superior Court and Cause No. 103176.]

PETITION BY GUARDIAN FOR INSTRUCTIONS

To the Honorable, the Superior Court of the State of California, in and for the City and County of San Francisco:

The petition of Clarissa Shortall, as guardian of the estate of Lois E. Senderman, a minor, respectfully represents:

1. That your petitioner was appointed guardian of the estate of said minor by this court on the 2nd day of May, 1946, and duly qualified as such on the 2nd day of May, 1946, whereupon on said day letters of guardianship were issued to her, which said letters have never been revoked or suspended and that she is now, and ever since has been, the duly appointed, qualified and acting guardian of the estate of said minor.

2. That on the 1st day of January, 1943, Lois J. Senderman, now Lois J. Newman, the mother of said minor Lois E. Senderman, as trustor and donor, and Richard S. Goldman as trustee, executed a Declaration of Trust wherein and whereby certain properties were irrevocably donated and placed in trust for the use and benefit of said Lois E. Senderman, a minor; that a true and correct copy of said trust is attached hereto and marked Exhibit "A".

Exhibit No. 9-I—(Continued)

3. That said Richard S. Goldman, the trustee named in said trust, died on the 1st day of March, 1946, and thereafter and on the 5th day of April, 1946, and upon the petition of Richard N. Goldman, as executor of the estate of Richard S. Goldman, the above-entitled court made its order appointing your petitioner herein, Clarissa Shortall, successor trustee in place and stead of said Richard S. Goldman, the deceased trustee; that a true and correct copy of said Petition and Order Appointing Successor Trustee in Place of the Deceased Trustee is attached hereto and marked Exhibit "B".

4. That Paragraph (3) of said trust hereinabove referred to and attached hereto and marked Exhibit "A" reads as follows:

"The Trustee may resign and discharge himself of the trust created hereunder by causing the property which he holds as Trustee to be transferred into the name of the duly appointed Guardian of said Lois E. Senderman, a minor. In the event of the death of the Trustee while this trust shall remain in force and effect his executors, administrators or heirs at law as the case may be, are hereby directed and empowered to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such Guardian has been appointed the executors, administrators or heirs at law of said deceased Trustee shall apply to a

Exhibit No. 9-I—(Continued)

Court of competent jurisdiction for the appointment of a Guardian to whom such property can be conveyed".

That in accordance therewith and on the 2nd day of May, 1946, Richard N. Goldman, as executor of the estate of Richard S. Goldman, the deceased trustee, petitioned the above-entitled court for the appointment of Clarissa Shortall as guardian of the estate of said minor and thereafter and on said day your petitioner was appointed as such guardian; that a true and correct copy of said Order Appointing Guardian is attached hereto and marked Exhibit "C".

5. That on said 2nd day of May, 1946, the said Clarissa Shortall resigned as such successor trustee and discharged herself of the aforesaid trust by causing the property which she held as trustee to be transferred into her name as the duly appointed guardian of said Lois E. Senderman, a minor.

6. That it was the intention of said Lois J. Newman, said trustor and donor, and of Richard S. Goldman, said Trustee, that said trust, Exhibit "A" hereto, be irrevocable and that the gift made thereby be irrevocable; and that the failure so to state specifically in said Declaration of Trust occurred through inadvertence and error and contrary to the express instructions of said Lois J. Newman.

7. That a controversy has arisen between your petitioner as guardian and Lois J. Newman, as trustor and donor of the aforesaid trust, relating to

Exhibit No. 9-I—(Continued)

the irrevocability of said trust, and of the gift made thereby and to the irrevocability of the transfer of said trust assets to your petitioner as guardian.

8. That said Declaration of Trust and the gift made thereby to said Lois E. Senderman were irrevocable by said trustor and that said trust terminated upon the appointment of your petitioner as guardian of the estate of said Lois E. Senderman and the transfer to her as said guardian of all the property belonging to said trust; that your petitioner as guardian holds said minor's property irrevocably for her use and benefit.

Wherefore, your petitioner prays for a hearing on this petition and for a decree of this court declaring that said trust and the gift made thereby were irrevocable by the trustor and donor, Lois J. Newman; that said trust terminated by the appointment of your petitioner as guardian and the transfer of the trust property to her as guardian; that your petitioner holds said minor's property irrevocably for her use and benefit; that an Order to Show Cause be directed to said Lois J. Newman and any other interested parties requiring them to appear before this court at a time and place to be fixed by the court to show cause why said Declaration of Trust and the gift to said minor made thereby should not be declared to be irrevocable, and further to show cause why your petitioner as guardian should not be held to hold said minor's property irrevocably for said minor's use

Exhibit No. 9-I—(Continued)

and benefit, and for such other and further relief as to the court may seem meet and proper in the premises.

CLARISSA SHORTALL,
Petitioner.

SAMUEL TAYLOR,
Attorney for Petitioner.

Duly Verified.

[Endorsed]: Filed April 22, 1947.

EXHIBIT No. 10-J

[Title of Superior Court and Cause No. 103176.]

AMENDED PETITION BY GUARDIAN FOR INSTRUCTIONS

To the Honorable, the Superior Court of the State of California, in and for the City and County of San Francisco:

The petition of Clarissa Shortall, as guardian of the estate of Lois E. Senderman, a minor, respectfully represents:

1. That your petitioner was appointed guardian of the estate of said minor by this court on the 2nd day of May, 1946, and duly qualified as such on the 2nd day of May, 1946, whereupon on said day letters of guardianship were issued to her, which said letters have never been revoked or suspended and that she is now, and ever since has

Exhibit No. 10-J—(Continued)

been, the duly appointed, qualified and acting guardian of the estate of said minor.

2. That prior to the 1st day of January, 1943, Lois J. Senderman, now Lois J. Newman, the mother of said minor Lois E. Senderman, owned certain stock of Aztec Brewing Company, a corporation. Said stock was her separate property. On or shortly after January 1, 1943, said Lois J. Senderman orally created an irrevocable trust of 800 shares of said stock for the use and benefit of said Lois E. Senderman. Said trust was created by said Lois J. Senderman orally instructing Richard S. Goldman to hold said stock which he had in his possession, in trust irrevocably for the use and benefit of said Lois E. Senderman and said Richard S. Goldman orally agreeing to do so and to act as trustee.

3. That thereafter, Richard S. Goldman as trustee executed a Declaration of Trust dated as of January 1, 1943, a true and correct copy of which is attached hereto and marked Exhibit "A".

4. That said Richard S. Goldman, the trustee named in said trust, died on the 1st day of March, 1946, and thereafter and on the 5th day of April, 1946, and upon the petition of Richard N. Goldman, as executor of the estate of Richard S. Goldman, the above-entitled court made its order appointing your petitioner herein, Clarissa Shortall, successor trustee in place and stead of said Richard S. Goldman, the deceased trustee; that a true and correct copy of said Petition and Order Appoint-

Exhibit No. 10-J—(Continued)

ing Successor Trustee in place of the Deceased Trustee is attached hereto and marked Exhibit "B".

5. That Paragraph (3) of said trust hereinabove referred to and attached hereto and marked Exhibit "A" reads as follows:

"The Trustee may resign and discharge himself of the trust created hereunder by causing the property which he holds as Trustee to be transferred into the name of the duly appointed Guardian of said Lois E. Senderman, a minor. In the event of the death of the Trustee while this trust shall remain in force and effect his executors, administrators or heirs at law as the case may be, are hereby directed and empowered to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such Guardian has been appointed the executors, administrators or heirs at law of said deceased Trustee shall apply to a Court of competent jurisdiction for the appointment of a Guardian to whom such property can be conveyed."

That in accordance therewith and on the 2nd day of May, 1946, Richard N. Goldman, as executor of the estate of Richard S. Goldman, the deceased trustee, petitioned the above-entitled court for the appointment of Clarissa Shortall as guardian of the estate of said minor and thereafter and on said day your petitioner was appointed as such guardian; that a true and correct copy of said Order Appoint-

Exhibit No. 10-J—(Continued)

ing Guardian is attached hereto and marked Exhibit "C."

6. That on said 2nd day of May, 1946, the said Clarissa Shortall resigned as such successor trustee and discharged herself of the aforesaid trust by causing the property which she held as trustee to be transferred into her name as the duly appointed guardian of said Lois E. Senderman, a minor.

7. That it was the intention of said Lois J. Newman, said trustor and donor, and of Richard S. Goldman, said Trustee, that said trust, Exhibit "A" hereto, be irrevocable and that the failure so to state specifically in said Declaration of Trust occurred through inadvertence and error and contrary to the express instructions of said Lois J. Newman.

8. That a controversy has arisen between your petitioner as guardian and Lois J. Newman, as trustor and donor relating to the irrevocability of said trust, Exhibit "A" hereto and to the irrevocability of the transfer of said trust assets to your petitioner as guardian.

9. That said Declaration of Trust, Exhibit "A" hereto was irrevocable by said trustor and that said trust and said oral trust terminated upon the appointment of your petitioner as guardian of the estate of said Lois E. Senderman and the transfer to her as said guardian of all the property belonging to said trust; that your petitioner as guardian holds said minor's property irrevocably for her use and benefit.

Exhibit No. 10-J—(Continued)

Wherefore, your petitioner prays for a hearing on this petition and for a decree of this Court declaring that said Lois J. Senderman orally created an irrevocable trust for the use and benefit of her daughter, Lois E. Senderman, and that said written trust was irrevocable; that said oral trust and said written trust terminated by the appointment of your petitioner as guardian and the transfer of the trust property to her as guardian; that your petitioner holds said minor's property irrevocably for her use and benefit; that an Order to Show Cause be directed to said Lois J. Newman and any other interested parties requiring them to appear before this Court at a time and place to be fixed by the Court to show cause why said oral trust and Declaration of Trust, Exhibit "A" hereto and the gift to said minor made thereby should not be declared to be irrevocable, and further to show cause why your petitioner as guardian should not be held to hold said minor's property irrevocably for said minor's use and benefit, and for such other and further relief as to the Court may seem meet and proper in the premises.

CLARISSA SHORTALL,
Petitioner.

SAMUEL TAYLOR,
Attorney for Petitioner.

Duly Verified.

[Endorsed]: Filed April 22, 1947.

EXHIBIT No. 11-K

[Title of Superior Court and Cause No. 103176.]

ORDER PURSUANT TO AMENDED PETITION BY GUARDIAN FOR INSTRUCTIONS

The amended petition of Clarissa Shortall, as guardian of the Estate of Lois E. Senderman, a minor, for instructions coming on regularly for hearing this 10th day of July, 1947, and Clarissa Shortall appearing in person and by her attorney, Samuel Taylor, Esq., and Lois J. Newman (formerly Lois J. Senderman) appearing in person and by her attorney, A. E. Levinson, Esq., and evidence both oral and documentary having been offered and introduced by the respective parties and the issue having been fully argued by counsel for the respective parties, and the Court having fully considered the evidence and arguments accordingly finds:

1. Notice of this hearing has been duly and regularly given according to law to Lois J. Newman (formerly Lois J. Senderman) whom the Court finds to be the mother of said minor and the person charged with the sole custody, care, support and control of said minor, and to Aaron Senderman whom the Court finds to be the father of said minor, and to the Commissioner of Internal Revenue, Washington, D. C.; the Secretary of the Treasury, Washington, D. C.; F. M. Harless, Internal Revenue Agent in Charge, 74 New Montgomery Street,

Exhibit No. 11-K—(Continued)

San Francisco; and the Collector of Internal Revenue, First District of California, 100 McAllister Street, San Francisco, California.

2. The allegations of said amended petition are true. Lois E. Senderman is a minor of the age of approximately twelve years and a resident of the City and County of San Francisco, State of California.

3. Clarissa Shortall was appointed guardian of the estate of said minor by this Court on the 2nd day of May, 1946, and duly qualified as such on said date whereupon on said date letters of guardianship were issued to her, which said letters have never been revoked or suspended and she ever since has been and now is the duly appointed, qualified and acting guardian of the estate of said minor.

4. Prior to the 1st day of January, 1943, Lois J. Senderman (now Lois J. Newman), the mother of said minor, owned approximately 2396⅞ shares of stock of Aztec Brewing Company, a California corporation. Said stock was her separate property.

5. On or within a few days after January 1, 1943, said Lois J. Newman orally created an irrevocable trust of 800 shares of said stock for the use and benefit of said minor, Lois E. Senderman. Said trust was created by said Lois J. Newman orally instructing her attorney, Richard S. Goldman, to hold said stock immediately and irrevocably for the use and benefit of said minor, and said Richard S. Goldman orally agreeing to do so and to act immediately as such trustee. Said stock was

Exhibit No. 11-K—(Continued)

in the possession of said Richard S. Goldman prior to and at the time of the creation of said trust.

6. An oral irrevocable trust of said stock was created by said conversation or within a few days after January 1, 1943, and continued until terminated on the 2nd day of May, 1946, by the appointment by this Court of Clarissa Shortall as guardian of the estate of said Lois E. Senderman and by the transfer of the trust property by Clarissa Shortall, successor trustee to said Richard S. Goldman, to Clarissa Shortall as guardian of the estate of said Lois E. Senderman.

7. Some six or seven months after the creation of said oral trust said Richard S. Goldman executed a written declaration of trust, a true and correct copy of which is attached to said amended petition as Exhibit "A." Said written trust, Exhibit "A," was intended to embody the terms of said oral trust, but through inadvertence and mistake on the part of said Richard S. Goldman and contrary to the express instructions and intent of said Lois J. Newman (formerly Lois J. Senderman) and contrary to the intent of said Richard S. Goldman, no express provision was inserted in said written trust (Exhibit "A") to the effect that it was irrevocable. The intent and the instructions to said Richard S. Goldman of said Lois J. Newman, and the intent of said Richard S. Goldman with respect to said trust were that it be irrevocable. The execution of said written instrument did not

Exhibit No. 11-K—(Continued)

terminate said oral trust, but said oral trust continued in full force and effect until terminated as hereinbelow stated.

8. Said Richard S. Goldman died on the 1st day of March, 1946, and thereafter on the 5th day of April, 1946, and upon the petition of Richard N. Goldman as executor of the estate of Richard S. Goldman, the above-entitled Court made its order appointing Clarissa Shortall successor trustee in place and stead of said Richard S. Goldman, the deceased trustee. A true and correct copy of said petition and order appointing successor trustee in place of deceased trustee is attached to the amended petition herein as Exhibit "B."

9. On the 2nd day of May, 1946, Richard N. Goldman as executor of the estate of said Richard S. Goldman, the deceased trustee, petitioned this Court for the appointment of Clarissa Shortall as guardian of the estate of said minor and thereafter and on said day Clarissa Shortall was appointed as such guardian. A true and correct copy of said order appointing guardian is attached to the amended petition herein as Exhibit "C."

10. On said 2nd day of May, 1946, said Clarissa Shortall resigned as such successor trustee and caused the property which she held as trustee to be transferred into her name as the duly appointed guardian of the estate of said Lois E. Senderman, a minor. Said oral trust and said written trust

Exhibit No. 11-K—(Continued)

terminated upon the appointment of Clarissa Shortall as guardian of the estate of said minor and the transfer to her as said guardian of all the trust property. Said guardian holds said minor's property irrevocably for her use and benefit.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that:

1. On or within a few days after January 1, 1943, said Lois J. Senderman (now Lois J. Newman) orally created an irrevocable trust by instructing Richard S. Goldman to act as trustee of 800 shares of stock of Aztec Brewing Company, the certificates of which he held in his possession and by said Richard S. Goldman orally agreeing to do so. Said oral trust became effective immediately upon its creation and continued in effect until terminated by the appointment of Clarissa Shortall as guardian of the estate of said minor on May 2, 1946, and the transfer on or about said date of said trust property to said guardian.

2. Some six or seven months after the creation of said oral trust said Richard S. Goldman executed a written trust. A true and correct copy of said written trust is attached to the amended petition herein as Exhibit "A." Said written trust was intended to embody the terms of such oral trust.

3. Said written trust did not terminate or modify said oral trust theretofore created but said oral trust continued in effect until terminated on May

Exhibit No. 11-K—(Continued)

2, 1946, by the appointment of Clarissa Shortall as guardian of the estate of said Lois E. Senderman and the transfer of the trust property to her as said guardian.

4. Said Clarissa Shortall as such guardian has held and now holds said property irrevocably for the use and benefit of said minor.

Done in open court this 10th day of July, 1947.

T. I. FITZPATRICK,
Judge of the Superior Court.

[Endorsed]: Filed July 24, 1947.

Form 709
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised September 1942)

(Space for use of Collector)
RECEIVED

...D BY Mark 15 05 ...

UNITED STATES

GIFT TAX RETURN

CALENDAR YEAR 19 46

(To be filed in duplicate with the Collector of Internal Revenue for the donor's district and later than the 15th day of March following the close of the calendar year)

(Space for use of Bureau)

RECEIVED
94 JAN 24 1947
COLL. INT. REV.
1st DIST. CALIF.
7

DONOR LOIS J. NEWMAN (formerly Lois J. Sanderson)
(Given name) (Middle name or initial) (Surname)

ADDRESS In care of Samuel Taylor
406 Montgomery Street

CITIZENSHIP

RESIDENCE San Francisco 4, California

Have you (the donor), during the calendar year indicated above, without an adequate and full consideration in money or money's worth, made any transfer exceeding $3,000 in value (or regardless of value if a future interest) as follows? (Answer "Yes" or "No")

1. By the creation of a trust (no) or the making of additions to a trust previously created (no), in either case for the benefit of a person or persons other than yourself, and with respect to which you retain no power to revest the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously created trust (no).

2. By permitting a beneficiary, other than yourself, to receive the income from a trust created by you and with respect to which you retained the power to revest the beneficial title to the property in yourself or to change the beneficiaries or their proportionate benefits (no).

3. By the purchase of a life insurance policy (no) or the payment of a premium on a previously issued policy (no), the proceeds of which are in either case payable to a beneficiary other than your estate, and with respect to which you retained no power to revest the economic benefits in yourself or your estate or to change the beneficiaries or their proportionate benefits; or by relinquishing every such power that was retained in a previously issued policy (no).

4. By permitting another to withdraw funds from a joint bank account which were deposited by you (no).

5. By conveying title to another and reserving to yourself (no) as tenants or to you and wife or husband as tenants by the entirety (no).

6. By the exercise or release of a power of appointment, except as provided in subparagraphs 1 and 2 of section 3 of the instructions (no).

7. By conveying community property to another, or by converting community property into separate property of your spouse or into a tenancy by the entirety of yourself and spouse (or other similar ownership), to the extent of your interest as prescribed by the rules set forth in section 3 of the instructions (no).

8. By any other method, direct or indirect (no).

If the answer is "Yes" to any of the foregoing, such a transfer should be fully disclosed under schedule A. SEE ATTACHED SCHEDULE

COMPUTATION OF AMOUNT OF NET GIFTS FOR YEAR

1. Total included amount of gifts for year (item *c*, schedule A)		NONE
2. Total deductions for charitable, public, and similar gifts for year (item *c*, schedule B)	$	
3. Specific exemption claimed (see section 11 of instructions)		
4. Total deductions (item 2 plus item 3)		
5. Amount of net gifts for year (item 1 minus item 4)		NONE

COMPUTATION OF TAX (see section 15 of instructions)

1. Amount of net gifts for year (item 5, above)	NONE
2. Total amount of net gifts for preceding years (item *c*, schedule C)	NONE
3. Total net gifts (item 1 plus item 2)	NONE
4. Tax computed on item 3	NONE
5. Tax computed on item 2	NONE
6. Tax on net gifts for year (item 4 minus item 5)	NONE

BUREAU RECORD

AFFIDAVIT OF PERSON FILING RETURN

I swear (or affirm) that this return, including the accompanying schedules and statements, if any, has been examined by me, and to the best of my knowledge and belief, is a true, correct, and complete return for the calendar year stated, pursuant to the Federal gift tax law and the regulations issued thereunder, and no transfer required by said law and regulations to be returned other than the transfer or transfers disclosed herein under schedule A was made by me (the donor) during said calendar year.

NOTARIAL SEAL

Sworn to and subscribed before me this 24 day of June, 1947

(Signature and title of officer administering oath)

(Signature of donor (executor/other person))

LOIS J. NEWMAN
In care of Samuel Taylor
406 Montgomery Street
San Francisco 4

AFFIDAVIT OF PERSON PREPARING RETURN

I swear (or affirm) that [illegible] herein and that this return, including the accompanying schedules and statements, if any, is a true, correct, and complete return, to the best of my knowledge and belief, and that all the information respecting the donor's gift tax liability of which I have any knowledge.

NOTARIAL SEAL

Sworn to and subscribed before me this 24 day of June, 1947

(Signature and title of officer administering oath)

NOTARY PUBLIC

(Signature of person preparing return)

SAMUEL TAYLOR
406 Montgomery Street
San Francisco 4, California

(Address of person preparing return)

16—87888-8

EX 12-L

Exhibit No. 12-L—(Continued)

Schedule Attached to 1946 Gift Tax Return of Lois J. Newman (Formerly Lois J. Senderman.)

On January 1, 1943, the donor (then known as Lois J. Senderman) created an irrevocable trust and placed therein 800 shares of Aztec Brewing Company stock for the benefit of her minor daughter, Lois E. Senderman. Richard S. Goldman was the trustee.

Said gift was duly reported by a gift tax return (Form 709) filed on or about March 15, 1944.

The Revenue Agent's office of the Bureau of Internal Revenue, in the course of the examination of donor's income tax return for 1943, has raised a question as to whether said trust was irrevocable. However, if said trust was a revocable gift of said property, or of the partnership interest of Aztec Brewing Company, a partnership (to which it was transformed between January 1, 1943, and the dates hereinafter mentioned), the gift of said property became irrevocable upon the death of Richard S. Goldman, the trustee, on March 1, 1946, and the appointment of Clarissa Shortall as guardian of the estate of Lois E. Senderman, a minor, thereafter on May 2, 1946, by the Superior Court of the State of California, in and for the City and County of San Francisco (No. 103176 in said Court), and the transfer of the trust property to said guardian immediately thereafter. Donor contends that there was no gift during the year 1946, but in view of the question as to revocability of the trust created

Exhibit No. 12-L—(Continued)

in 1943 which has been raised by the Revenue Agent, this gift tax return is being filed as a protective measure.

State of California,
City and County of San Francisco—ss.

Lois J. Newman (formerly Lois J. Senderman), being duly sworn, deposes and says:

The reason for the late filing of the attached gift tax return for the calendar year 1946 is as follows: Affiant did not believe, and still does not believe that she made any gifts in 1946 or that a gift tax return was due for said year. Her counsel have so advised her. However, her counsel have further advised her that in view of a question which has recently been raised by the Revenue Agent's office in connection with an examination of her income tax return for 1943, as explained in the statement under Schedule A of this return, it would be advisable for her to file a gift tax return for 1946 as a protective measure. Immediately upon receiving such advice from counsel affiant requested her counsel to prepare and file this return.

/s/ LOIS J. NEWMAN.

Subscribed and sworn to before me this 20th day of June, 1947.

[Seal] /s/ EDITH LOWERY

Notary Public in and for the City and County of San Francisco, State of California. My commission expires December 24, 1948.

19 T. C. No. 87

The Tax Court of the United States

Docket No. 29650

Promulgated January 22, 1953

LOIS J. NEWMAN (Formerly LOIS J. SENDERMAN) Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

FINDINGS OF FACT AND OPINION

1. Held, neither the oral trust nor the written trust here involved was "expressly made irrevocable by the instrument creating the trust" * * * as provided in section 2280 Civil Code of California.

2. Held, transfer of trust assets on May 2, 1946, to guardianship estate of minor beneficiary constituted a taxable gift. Harris vs. Commissioner, 340 U.S. 106, distinguished.

3. The value of the gift consummated May 2, 1946, held, not to include a certain item in the amount of $64,035.05, the existence of which is the subject matter of a separate income tax proceeding by the same taxpayer in another docketed case currently pending hearing before this Court.

Samuel Taylor, Esq., and Walter G. Schwartz, Esq., for the petitioner.

Edward H. Boyle, Esq., for the respondent.

This proceeding involves a deficiency in gift tax

of petitioner for the year 1946 in the amount of $71,195.99.

The issues presented are: (1) Whether the transfer by petitioner in 1943 of certain property in trust constituted a completed gift in that year or whether, as determined by respondent, the completed gift occurred in 1946 upon termination of the trust and distribution of the corpus to the guardian for the beneficiary; and (2) whether such gift, if effected in 1946, included an item described in respondent's notice of deficiency as "Overpayment of Income Tax and Accrued Interest for the Years 1943-1945" at a value of $64,035.05.

One other issue raised by the pleadings herein has been settled by stipulation of the parties and will be reflected in a Rule 50 computation.

Findings of Fact

So much of the facts as were stipulated are made a part hereof by this reference.

The petitioner is an individual residing in Sherman Oaks, California. The gift tax return for the calendar year 1946, here involved, was filed on or about June 23, 1947, with the collector of internal revenue for the first district of California, at San Francisco.

Petitioner was divorced from Aaron Senderman in 1940. Thereafter she was unmarried and her name at all times material hereto prior to December, 1944, was Lois J. Senderman. In December, 1944, petitioner married Louis Newman, and her

name from that time to the present has been Lois J. Newman. Petitioner has had only one child, a daughter, named Lois E. Senderman, who was born on May 14, 1935.

For a number of years prior to January 1, 1943, petitioner owned as her separate property 2,396⅞ shares of stock of Aztec Brewing Company (hereinafter called Aztec), a California corporation operating a brewery in San Diego, California. These shares represented approximately one-fourth of the issued and outstanding stock of such corporation, and had been inherited by petitioner from her parents in 1935.

On or about January 1, 1943, Richard S. Goldman, who was petitioner's attorney from 1935 until his death in 1946, received from petitioner 800 shares of stock in Aztec, to be held in trust by him for petitioner's daughter, Lois E. Senderman. At the time of the receipt, Goldman orally declared himself to be trustee of such trust, effective immediately. Some six or seven months thereafter, Goldman, as trustee, executed a written declaration of trust under which he declared himself trustee of 800 shares of Aztec stock for the benefit of Lois E. Senderman. This declaration of trust was predated to January 1, 1943. Such declaration of trust was not "expressly made irrevocable."

Petitioner filed Federal and State of California gift tax returns for the calendar year 1943 in which she reported a gift to her daughter of 800 shares of Aztec stock by reason of the creation of the foregoing trust. The value of such gift was reported in

the Federal return as $30,000 with no gift tax payable thereon.

On or about February 24, 1944, Aztec Brewing Company, a limited partnership, was formed. On or about March 31, 1944, Aztec Brewing Company, a corporation, was dissolved. The assets and liabilities of the corporation were transferred to the partnership. The stockholders in the corporation became partners in the new partnership with partnership interests proportionate to their respective stockholdings in the corporation. The trust for Lois E. Senderman became a limited partner with an 8 per cent partnership interest. The fair market value of an 8 per cent interest as a limited partner of Aztec, a limited partnership, on May 2, 1946, and throughout the calendar year 1946, was $151,051.09.

On March 1, 1946, Richard S. Goldman died. On March 26, 1946, Richard N. Goldman, his son, was appointed the executor of his estate and on that day qualified as such. On April 5, 1946, Clarissa Shortall, as attorney for Richard N. Goldman, filed a petition for appointment of successor trustee or trustees in place of the deceased trustee, and was appointed on that day successor trustee to Richard S. Goldman by order of the Superior Court in and for the city and county of San Francisco, California.

On May 2, 1946, upon petition of the substitute trustee so appointed, the Superior Court in and for the city and county of San Francisco, California, appointed Clarissa Shortall as guardian of the estate of Lois E. Senderman. On that date the

assets of the trust for the minor, Lois E. Senderman, were transferred to Clarissa Shortall pursuant to the court order appointing her as guardian. Clarissa Shortall had been associated with the elder Goldman and had participated with him in the handling of the trust matters. The appointment of a guardian and creation of the guardianship estate was provided for in the original trust indenture executed as of January 1, 1943, upon resignation or death of the original trustee.

After the revenue agent, who examined the tax returns of petitioner and her daughter, raised a question as the revocability of the daughter's trust, Clarissa Shortall, on or about April 22, 1947, as guardian for such minor, filed a petition with the Superior Court in and for the city and county of San Francisco, California, for instructions. Paragraph 6 thereof reads, in part, as follows:

6. That it was the intention of said Lois J. Newman, said trustor and donor, and of Richard S. Goldman, said Trustee, that said trust, * * * be irrevocable and that the gift made thereby be irrevocable; and that the failure so to state specifically in said Declaration of Trust occurred through inadvertence and error and contrary to the express instructions of said Lois J. Newman.

On or about June 23, 1947, Clarissa Shortall further filed with such court an amended petition for instructions in which, for the first time, reference was made to the existence of an oral trust. In addition, it is stated therein that through inadvertence

and error the written trust failed to contain an express provision as to its irrevocability.

On June 24, 1947, petitioner filed, as a protective measure, a gift tax return relating the history of the trust and claiming no gift tax then due for the year 1946, such return showing no tax due.

On July 10, 1947, a court hearing was held on the amended petition and evidence, both oral and documentary, was offered. Clarissa Shortall, as guardian, appeared in person and by her attorney. Petitioner also appeared in person and by her attorney. After the case was heard and argued the court entered an order wherein it adjudged and decreed that:

1. On or within a few days after January 1, 1943, said Lois J. Senderman (now Lois J. Newman) orally created an irrevocable trust by instructing Richard S. Goldman to act as trustee of 800 shares of stock of Aztec Brewing Company, the certificates of which he held in his possession and by said Richard S. Goldman orally agreeing to do so. Said oral trust became effective immediately upon its creation and continued in effect until terminated by the appointment of Clarissa Shortall as guardian of the estate of said minor on May 2, 1946, and the transfer on or about said date of said trust property to said guardian.

2. Some six or seven months after the creation of said oral trust said Richard S. Goldman executed a written trust. * * * Said written trust was intended to embody the terms of said oral trust.

3. Said written trust did not terminate or modify said oral trust theretofore created but said oral

trust continued in effect until terminated on May 2, 1946, by the appointment of Clarissa Shortall as guardian of the estate of said Lois E. Senderman and the transfer of the trust property to her as said guardian.

4. Said Clarissa Shortall as such guardian has held and now holds said property irrevocably for the use and benefit of said minor.

* * * * *

The petitioner and her minor daughter, during the calendar year 1943, and during all subsequent years, were on a calendar year cash basis for Federal and State of California income tax purposes. The trust for the minor during the calendar year 1943 and during all subsequent years until its termination in 1946, was on a calendar year cash basis for Federal and State of California income tax purposes. For the calendar year 1943 and for all subsequent years, the trust for Lois E. Senderman (up to the time of its termination) and/or that for the minor reported in their respective Federal and State of California income tax returns the entire income from 800 shares of Aztec stock and from the partnership which replaced that corporation and from the other investments which were purchased with the income from the 800 shares and the distributions from the partnership.

By means of letters of the type commonly known in Federal tax circles as 30-day letters, addressed to the trust and to the minor, both of which letters being dated August 25, 1949, the Internal Revenue Agent in Charge, San Francisco Division, proposed

overassessments in income tax in favor of the trust and of the minor for the calendar years 1943 through 1945 in the aggregate amount of $62,763.47, as follows:

Calendar Year	Taxpayer	Amount of Proposed Overassessment
1943	Lois E. Senderman, a minor	$ 3,285.48
1944	Lois E. Senderman, a minor	6,776.42
1945	Lois E. Senderman Trust	52,701.57

On March 3, 1950, the trust and the minor filed protests with the Bureau of Internal Revenue against such overassessments. No part of any of the proposed overassessments nor any interest thereon has been received by the trust or by the minor nor has any part thereof been scheduled for refund to the trust or the minor.

The Commissioner, in a notice of deficiency, dated January 23, 1951, determined deficiencies in income tax against the petitioner for the calendar years 1943 to 1947, inclusive, as follows:

Year	Deficiency
1943	$ 7,575.67
1944	43,486.63
1945	63,164.93
1946	102,072.23
1947	28,084.93

These deficiencies are based mainly, and the overassessments, referred to above, are based wholly, upon the inclusion in petitioner's income of all of the income reported by the trust and by the minor during the calendar years 1943 to 1947, inclusive (except that the deficiency for 1944 is based upon an addition to petitioner's income of approximately $78,000, of which approximately $20,000 represents

income reported by the minor). The amount of the deficiency determined against petitioner for each of the years involved, which is attributable to inclusion in petitioner's income of all of the income reported by the trust and by the minor is in excess of the amount of the overassessment proposed in favor of the trust or the minor for the same calendar year. The petitioner, on April 9, 1951, filed a petition with this Court, which petition was docketed as No. 33431, in which it was alleged that the deficiencies were erroneously asserted and that the inclusion of the income of the trust and the minor in petitioner's income for each of the calendar years is erroneous. That proceeding is now pending before this Court.

Opinion

Van Fossan, Judge: The parties to this proceeding involving gift taxes for 1946 agree that the transfer by petitioner of the property in controversy for the benefit of her minor daughter constituted a taxable gift within the purview of sections 1000 (a) and 1002 of the Internal Revenue Code.[1]

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[1] Sec. 1000. Imposition of Tax.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident of property by gift. * * * * * * * * *

Sec. 1002. Transfer for Less Than Adequate and Full Consideration.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value

They disagree as to the year, 1943 or 1946, in which the gift was completed. Respondent has determined that the taxable transfer took place in 1946. The pertinent facts are set forth above.

It is respondent's contention that the 1943 trust is not expressly made irrevocable by the declaration of trust instrument creating it, and that, having been so created subsequent to 1931, the trust was revocable under section 2280 of the Civil Code of California, as amended in 1931.[2] He argues, therefore, that the transfer of the trust corpus to the guardian of the estate of petitioner's minor daughter on May 2, 1946, constituted a completed gift by the petitioner-donor at that time. Respondent makes no claim in the instant litigation that the income of the trust from its creation in 1943 until its termination in 1946 was taxable to petitioner under either section 22 (a) or 166 of the Code. Citing and relying upon our opinion in Erik Krag, 8 T.C. 1091, as controlling, respondent argues on brief that the decree of the local court amounted only to a

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of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

[2] Sec. 2280. [Revocation of trust.] Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. * * *

consent decree; that, moreover, being made after the trust terminated it was a moot decree; and that, therefore, we are not bound to give any effect to it whatsoever.

Petitioner, on the other hand, maintains that not only does the trust instrument in controversy meet the requirements of section 2280, supra, as respects its irrevocability but also that the oral trust earlier created was intended to be, and was, irrevocable, and that both trusts remained in existence from the time they were created until they were both terminated in 1946. To support this position, petitioner points to the July 10, 1947 decree of the Superior Court in and for the city and county of San Francisco so construing the trusts. Petitioner cites such cases as Susan B. Armstrong, 38 B.T.A. 658; Estate of Cyrus M. Beachy, 15 T.C. 136; Blair vs. Commissioner, 300 U.S. 5, and others of similar import for the proposition that the State court's decree is dispositive of the issue before us and that we are bound to give effect thereto.

The question here in issue turns upon a proper construction of the trusts created by petitioner in 1943. Whether either or both trusts were revocable or "expressly made irrevocable" involves an interpretation of the law of California in which State such trusts were created and administered. The decree of the State court, relied upon by petitioner, involving, as it does, the same subject matter and purporting to construe the property laws of California with regard thereto is conclusive of the issue here presented if the Court decree represented an

independent judgment in a real controversy between the parties and was not merely a consent decree entered pro forma in a friendly suit. On the facts here present we cannot catalogue the instant proceeding for instruction as a real and bona fide controversy. There was no controversy between the parties and no independent judgment was rendered. Estate of Ralph Rainger, 12 T.C. 483, affirmed 183 F.2d 587 (C.A.9); certiorari denied .. U.S. ..; Marjorie F. Ridgely Saulsbury vs. United States, .. F.2d .. (C.A.5) (November 10, 1952).

The facts in this case are so strikingly parallel to those in Erik Krag, supra, and Gaylord vs. Commissioner (C.A.9), 153 F.2d 408, affirming 3 T.C. 281, and the holding of those cases is so clearly applicable that we need go little further than to cite these controlling authorities. Every question that could be raised, and every contention that is here advanced, is answered therein. Any distinction between those cases and that here before us is in form and not in substance.

There can be no question that the written agreement, as drafted and as in effect in the years 1943 through 1946, was not "expressly made irrevocable by the instrument creating the trust" [emphasis supplied], and under the cases cited must be deemed revocable by the donor under the statute. Nor was the attempt to have the trust construed as irrevocable, as appears in the order of the court of July 24, 1947, effective for tax purposes. Gaylord vs. Commissioner, supra. It could not, by a process of retroactivity, defeat the incidence of the Federal

tax laws. Here, as in the Gaylord case, it cannot be said that "the gift tax returns with their references to irrevocability had the effect of amending the trust declaration."

Whatever the parties may have had in mind, we are more impressed by what they did in furtherance of their intention, or, more accurately, what they did not do.

The existence of the oral trust was not mentioned in the written instrument, albeit petitioner now contends it was in full force and effect for six or seven months. When the written trust was being prepared, two lawyers, one of them the trustee under the trust, the other his associate and successor as advisor to the trust, both experienced and fully cognizant of the desires of the donor, participated in the drafting of the instrument. Despite the fact, if it be a fact, that both lawyers understood that petitioner wished an irrevocable trust, no reference was made to an existing irrevocable oral trust nor was the word "irrevocable," or any word to the same effect, used or incorporated specifically, or by interpretation or by proper inference, in the writing. Again, difficult to comprehend, is the fact that the oral trust on which petitioner now so heavily leans was not mentioned in the petition filed in April, 1946 for appointment of a successor trustee, nor in the petition for appointment of a guardian, nor in the order appointing the guardian, nor yet again, in the original petition by guardian for instructions. All of these documents refer to a written trust and in one of them the statement is made that through

error and inadvertence the express mention of irrevocability was omitted from the written declaration of trust.

It was not until June 23, 1947, and after the revenue agent had questioned the character of the trust, that we find mention of the oral trust.

Confronted with these facts, petitioner falls back on the oral trust, contending that at the time it was declared it was expressly made irrevocable and that it remained in existence even after the execution of the written trust. Petitioner points to testimony of petitioner and her lawyer attesting to such fact. Here we would simply quote the old saying, —"actions speak louder than words." The inconsistencies in the evidence, the presence of contradicting documents, and the inferences to be drawn from the whole record lead us reluctantly to the conclusion that the spoken word must yield to the documented conclusion that no irrevocable oral or written trust existed. Moreover, if anything additional need be called to attention to fortify the conclusion as to the oral trust, such trust was rendered wholly void and was effectively wiped out by the back dating of the written trust to January 1, 1943. Certainly, there cannot co-exist two such trusts employing the same corpus.

Where, as here, the issue presented on the evidence raises a question of credibility of testimony, the Court is obliged to weigh the evidence carefully, determine the probabilities of accuracy, and accept or discount the evidence by consideration of the interests of the parties, and thus, from the whole record, determine where lies the truth.

If the oral trust was intended to be irrevocable, why, when it was transmuted into the written trust, did the written trust fail to mention either the oral trust or the word "irrevocable"? We find it impossible to believe that Goldman, an experienced lawyer, presumptively familiar with the provisions of Section 2280 of the California Code and cognizant of all the facts, would inadvertently omit from the declaration of the trust the express provision called for by the statute. One sentence of five words would have sufficed to have removed all question as to the revocability of the trust. Nor can we blink the fact the petition for instructions was not filed in the California Superior Court until 1947 when the revenue agent raised the question of revocability of the trust, with possible Federal tax consequences.

By changing the names of the parties and a few dates, the pattern in the instant case fits almost precisely into the situation existing in the Krag and Gaylord cases. On the authority of the Krag and Gaylord cases cited above, we sustain respondent's holding that the 1943 written trust, here under study, was a revocable trust; that whatever its form, the oral trust was superseded by the written trust; that the transfer of title occurred in 1946 when the written trust was terminated and the trust property transferred to the guardian for the minor, and that petitioner should be taxed accordingly.

Having found that neither of the trusts created in 1943 was, under California law, irrevocable, and that accordingly no completed gift was consummated in that year, we turn now to consider the facts tax-wise of the May 2, 1946 transfer of trust

assets to the guardianship estate of petitioner's minor daughter. Citing Harris vs. Commissioner, 340 U.S. 106, petitioner argues that, since the transfer was pursuant to a court order, it does not represent a taxable gift.

The factual situation present in the Harris case is clearly distinguishable at critical and important points, and would appear to have no application here. That case involved a divorce proceeding and a property settlement agreement incident thereto. The settlement in question was clearly an arm's length transaction. The element of donative intent was absent. Nor was a promise or an agreement an operative factor. The transfer was made dependent upon and pursuant to a decree of a court charged under state law with decreeing a just and equitable disposition of the community and separate property of the parties before it. Nevada Compiled Laws, Section 9463.

Although she failed legally to effectuate a valid gift for tax purposes, since, as we have seen, it was done by a trust revocable under California law, she, nevertheless, harbored the same donative intent at all times here material. Moreover, the role of the state court here was not that of arbiter between two contesting parties. The terms of the trust instrument itself provided for the termination of the trust and the transfer of the corpus thereof to a guardian. As is customary in the cases involving property rights of a minor, application was made to a court of competent jurisdiction for authorization so to transfer the trust assets and for appoint-

ment of a guardian to receive and hold the same. The court's function was merely to see that the transfer was in accord with the trust instrument and to appoint a fit guardian. It exercised discretion only with respect to the latter.

But, contends petitioner, the doctrine of the Harris case is not to be limited and must apply whenever a transfer of property is made pursuant to a court decree. With this contention, we must disagree. Such broad application would have the effect of repealing by judicial process the gift tax statute and would make possible avoidance of a gift tax by the simple expedient of making any gift contingent upon a consent decree of a local court. We cannot believe that the Supreme Court intended or contemplated any such result. Rather, we feel that the drastic consequences " * * * of such a broad application of the Harris case * * * require the strictest limitation of that case to its actual facts." See Taylor and Schwartz, "Tax Aspects of Marital Property Agreements," 7 Tax Law Review 9, 49 (November, 1951) and the rationale contained therein.

The final issue is whether the gift which we have held was effected on May 2, 1946, included the item described in respondent's notice of deficiency "Overpayment of income tax and accrued interest for the years 1943-1945" in the amount of $64,035.05.

Respondent contends that since no valid gift was consummated in 1943, the corpus and the earnings thereon from 1943 to May 2, 1946, constituted the property of petitioner; that it was a mistake and

error for the beneficiary to pay income tax on such earnings for 1943 and 1944 and for the trust so to do for 1945; that having mistakenly and erroneously paid such tax, the trust and/or the beneficiary were entitled, as of May 2, 1946, to a return or refund of the taxes so paid, together with interest; that such right amounted, in effect, to a claim for refund, an account receivable, or a chose in action; that this claim for refund, account receivable, or chose in action constituted a valuable property right, which, until May 2, 1946, remained the property of the trustor just as the amount of income taxes and interest would have remained the property of the trustor had no payment been made to the Commissioner and had they remained at all times a part of the trust corpus; and finally, that upon termination of the trust and transfer of the corpus to the guardian for the beneficiary, the property right, as part of the trust corpus, passed to the guardian beyond the control of the trustor and was part of the gift consummated at that time.

While respondent's argument might conceivably be of some weight if the income tax liability were here involved, we feel it to be misplaced and beside the point in the present posture of the parties and the issue involved. The very existence of the valuable property right which respondent says was transferred from petitioner to the guardianship estate has at all times material been in dispute and is presently being contested in another action pending before this Court. Therefore, such contingent property right cannot be said to be in esse prior to

the time it is so held to be in that proceeding. Nor can it provide a basis for a determinative conclusion herein. Since the income tax liability is not at issue here, we have no alternative to holding as error, the inclusion of the controverted and contingent amount within the gift consummated May 2, 1946.

Reviewed by the Court.

Decision will be entered under Rule 50.

Johnson and Raum, JJ, concur in the result.

Served January 22, 1953.

The Tax Court of the United States
Washington

Docket No. 29650

LOIS J. NEWMAN (Formerly Lois J. Senderman), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the Court's Findings of Fact and Opinion promulgated January 22, 1953, respondent, on April 3, 1953, filed his proposed computation of tax for entry of decision. On May 13, 1953, the case was called for settlement under Rule 50, at which time the computation filed by the respondent was not contested by the petitioner. Wherefore, it is

Ordered and Decided: That there is a deficiency of $50,079.84 in gift tax for the year 1946.

[Seal] /s/ ERNEST H. VAN FOSSAN,
Judge.

Entered May 15, 1953.

In the United States Court of Appeals
for the Ninth Circuit

T.C. Docket No. 29650

LOIS J. NEWMAN (formerly LOIS J. SENDERMAN), Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW

Taxpayer, the petitioner in this cause, by Martin Gang, Norman R. Tyre and Louis M. Brown, counsel, hereby files her petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by The Tax Court of the United States promulgated on January 22, 1953 and entered on May 15, 1953, 19 TC.., No. 87, determining deficiency in petitioner's gift tax for the year 1946 in the amount of $50,079.84, respectfully shows:

I.

The petitioner, Lois J. Newman (formerly Lois J. Senderman), is a resident of the County of Los Angeles, State of California.

The aforesaid decision of the Tax Court of the United States may be reviewed by the United States Court of Appeals for the Ninth Circuit, the petitioner having filed a gift tax return for the year 1946 in the Collector's office for the First District of California at San Francisco, California.

II. Nature of the Controversy.

The controversy involves the determination of the year in which petitioner made a gift. The petitioner made a gift in trust to her daughter in 1943. She filed Federal and State gift tax returns. The value of the gift was reported in the Federal return as $30,000.00 with no gift tax payable thereon. The petitioner asserts that a completed gift occurred in 1943.

The respondent asserts that the completed gift occurred in 1946. The gift in 1943 was made to a trustee who died in 1946. Upon his death in 1946 the corpus of the trust was distributed to the guardian of the beneficiary and by reason thereof, respondent asserts that the completed gift occurred in 1946.

III.

The said taxpayer, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

IV. Assignments of Error.

The petitioner assigns as error the following acts

and omissions of The Tax Court of the United States:

(1) The ruling that the completed gift did not occur in 1943 is contrary to the evidence.

(2) The ruling that the completed gift occurred in 1946 is contrary to the evidence.

(3) With no conflicting evidence, finding facts contrary to the evidence presented.

(4) Disregarding the order of the Superior Court in and for the County of San Francisco, California.

(5) Failing to recognize the substance, rather than the form, of a transaction.

(6) The finding of deficiency of gift tax for the year 1946.

(7) The finding that Richard S. Goldman declared himself trustee.

(8) Failing to find taxpayer on January 1, 1943 declared Richard S. Goldman trustee of irrevocable trust.

(9) Failing to find that taxpayer had no donative intent in 1946.

(10) Holding that the trust became irrevocable upon appointment of guardian.

MARTIN GANG and
NORMAN R. TYRE
LOUIS M. BROWN
/s/ By LOUIS M. BROWN,
Counsel for Petitioner.

Duly Verified.

[Endorsed]: T.C.U.S. Filed August 10, 1953.

Before the Tax Court of the United States

Docket No. 29650

In the Matter of: LOIS J. NEWMAN,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Court Room 421, U. S. Appraisers Building, San Francisco, California, Friday, November 2, 1951.

(Met, pursuant to notice, at 2:00 p.m.)

Before: Hon. Ernest H. Van Fossan, Judge.

Appearances: Samuel Taylor, Esq., and Walter G. Schwartz, Esq., 1211 Balfour Building, San Francisco, California, appearing on behalf of Petitioner. Edward H. Boyle, Esq., (Hon. Charles Oliphant, Chief Counsel, Bureau of Internal Revenue) appearing on behalf of Respondent. [1*].

The Clerk: Docket No. 29650, Lois J. Newman.

Mr. Taylor: Samuel Taylor and Walter G. Schwartz, ready for the Petitioner.

Mr. Boyle: Edward H. Boyle, for the Respondent.

The Court: Will you state the issues for the Petitioner.

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* Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Taylor: This case involves a gift tax. The Commissioner has determined a deficiency in the gift tax for the calendar year 1946, of $71,195.99.

The taxpayer claims that no gift was made in 1946, and that no amount of gift tax is due. The issue is whether or not the taxpayer made an irrevocable gift to her daughter in trust in 1943, or whether the trust created in 1943 was a revocable trust which became irrevocable when the corpus thereof was distributed to the guardian of the estate of the donee, a minor, in 1946.

The year before this Court in this case is the year 1946. The taxpayer contends that she made an irrevocable gift in 1943, and hence that there was no gift in 1946. The stipulation of facts which is being filed in this case shows that she filed Federal and State of California gift tax returns for the year 1943, disclosing that the gift was an irrevocable gift. The gift was one in trust. In 1946 the trust terminated.

Both oral and stipulated evidence will be introduced [3] and will show that the taxpayer had an only child, a daughter, who was eight years old in 1943. The taxpayer was a woman who had her ups and downs in life. She had had financial difficulty, and she knew what it was to need money. Her parents had died in 1935 and had left her some shares of stock in a California corporation that operated a brewery in San Diego, the Aztec Brewing Company. This stock, at the time her parents died and for some years thereafter, did not have much value, but after Pearl Harbor, with the airplane construc-

tion work which came to the San Diego area, the brewery became very prosperous and the stock became very valuable.

With the thought of protecting her only child in all events, the taxpayer in January, 1943 decided to make an irrevocable gift in trust of some 800 shares of the stock of the Aztec Brewing Company for her daughter. She transferred this stock to Richard S. Goldman, her attorney, and he orally declared himself trustee of an irrevocable trust for the Petitioner's daughter.

Some six or seven months later he declared himself as trustee in writing. This written declaration of trust is Exhibit 2-B to the stipulation of facts. It purports to be dated January 1, 1943, but the evidence will show that it was not executed until six or seven months after that date.

The controversy in this case centers around California Civil Code, Section 2280, which provides in part: [4] "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee."

The attorney, Mr. Goldman, in executing the written declaration of trust, did not use the word "irrevocable." He used neither the word "revocable" nor the word "irrevocable."

However, he provided—and since this comes to the guts of the case, your Honor, and I would like to make a rather full opening statement so that as you hear the testimony you may more fully appreciate the issue—in this written declaration of trust,

Exhibit 2-B—and this trust was signed by him—this is a trust in which the trustee declared himself trustee, rather than a trust where the trustor by the terms of the trust transfers property to the trustee.

Mr. Goldman, in declaring himself trustee, stated that he agreed to transfer and deliver to the duly appointed guardian of the estate of Lois E. Senderman, the minor, the corpus and accumulated income of the trust estate; and in the event that no guardian was appointed that he would deliver this property to the minor when she reached twenty-one, and if she died before twenty-one that he would deliver the property to her executor or administrator.

The trust further provided that the trustee could resign and discharge himself of the trust by having the property transferred into the name of the duly appointed guardian of [5] the minor.

It further provided—and this provision is more important, because this is what actually happened—that in the event of the death of the trustee while this trust was in force and effect, his executors were authorized and directed to immediately apply to a court of competent jurisdiction—that is, to the State Courts of California—to deliver to the duly appointed guardian of the minor the property held in trust.

The trust had one final provision, which is of great importance. It provided that the obligation of the trustee would simply be to hold the property, and upon the termination of his liability as trustee, the trustee should before transferring the

property reimburse himself for any costs or expenses or charges incurred by him.

It then provided: "Upon the complete payment of all obligations, any balance remaining in the hands of the trustees shall be paid and delivered to said Lois E. Senderman, a minor, or if she has arrived at the age of majority, then to said Lois E. Senderman."

In other words, the trust provided that if anything happened to the trustee, either through the action of the trustee or otherwise, all the property should go automatically to the minor, who was the beneficiary of the trust.

Now, what actually happened was that in 1946 Mr. Goldman committed suicide, and the property was then [6] transferred, pursuant to court order to Clarissa Shortall, as the guardian of the estate of the minor.

The taxpayer contends that the provisions referred to in to the trust made it expressly irrevocable. The Commissioner must in this case contend that the trust is not an irrevocable trust, because the word "irrevocable" is not used therein. The Commissioner must contend that the word "irrevocable" is a word of art and that unless——

The Court: Do you know that he is contending these things?

Mr. Taylor: Do I know?

The Court: Yes. He will state his position.

Mr. Taylor: Perhaps I am stating my position in the terms of meeting his contentions. Of course, I have no power or no intention to foreclose Mr.

Boyle from making such arguments as he wishes.

The Court: We do not wish any argument at this time, just a statement of how the issue arises.

Mr. Taylor: Very well.

The question, then, is whether or not the trust can be expressly irrevocable where the word "irrevocable" is not used therein. We contend that the language which I have called to your attention makes the trust expressly irrevocable, even though the word "irrevocable" is not used.

Our second contention is that the uncontradicted [7] evidence will show that an oral irrevocable trust was created shortly after January 1, 1943; and the testimony will show that this trust was unquestionably made irrevocable, so that even assuming that the word "irrevocable" in a written trust is an indispensable word to make the trust irrevocable, still there was an irrevocable oral trust in this case created in 1943, and the fact that when that trust was reduced to writing the word "irrevocable" was omitted, we contend is of no consequence.

Our third contention is that all question as to whether an irrevocable trust was created by the taxpayer in this case is settled by an adjudication on the point of the Courts of California. The evidence pertaining to that adjudication has been stipulated and will be found in the stipulation.

Finally, we contend that if this Court should determine that there was a transfer of property by gift or for less than an adequate and full consideration in money or money's worth during 1946, then such transfer was effected by a Court decree,

and such transfer, under the doctrine of the United States Supreme Court in Harris vs. Commissioner, 340 U.S. 106, was not subject to gift tax.

That sums up the issues in this case, your Honor.

The Court: Mr. Boyle, will you state your position?

Mr. Boyle: If your Honor please, a trust was [8] created in 1943 and the Petitioner made a transfer to the trust and filed a gift tax return in the amount of $30,000. The value of the gift stated was $30,000, so there was no liability.

The Respondent takes the position that that trust created in 1943 was revocable. Under the California Civil Code quoted, unless a specific provision is made that the trust is irrevocable, it is revocable.

The Commissioner takes the position that being revocable, the transfer constituting the corpus was not a completed gift, and that consequently no gift tax liability could lie in the year 1943.

In 1946, the Commissioner asserts gift tax liability on the ground that trust was dissolved and the corpus transferred to a guardian of the beneficiary, at which time all title and interest that the trustor might have had by reason of having the power to revoke, passed out of her, and the title then went into the beneficiary. The Commissioner takes the point of view that that is the year in which the gift tax liability lies.

Of course, in the intervening years the beneficiary and the trust paid income tax liability on the earnings of the corpus; and the Commissioner in another action, which is docketed but which is not on this

calendar, is asserting income tax liability on the trustor for those years. [9]

In the year 1946 these State Court actions referred to in the Petitioner's opening argument are deemed to be consent decrees, and the evidence will show that. Therefore, they are not binding on this Court.

The corpus of the trust in 1946, which passed to the beneficiary, was composed of three items: cash, securities and eight per cent interest in a business. There is no controversy as to those values.

On the third item which makes up this corpus, there is some controversy. That involves the income tax returns, or the income tax payments, made by the beneficiary for 1943 and '44, and by the trustee in '45. Respondent's position is that if this Court holds that the gift was made in 1946, those taxes were erroneously paid and that money would have been in the corpus in 1946 if they had not been erroneously paid; and also that that money will come back by way of refund to the trust and to the beneficiary, and since the trust has been dissolved and the title of the corpus passed on to the beneficiary, it will go to the beneficiary, so it is an additional part of the gift.

The Petitioner has amended his opening petition. He hasn't submitted it yet, but he will, and in the amended petition he mentions this approach of the Harris Decision. We have an answer to that amended petition, but we won't show anything on that approach because we will answer it in brief.

This is actually the third or fourth amendment

and we are not sure—not filed with the Court, you understand, there is just going to be one amended petition filed, but he has changed it several times, and we are not sure what the approach is going to be, so we will answer that on brief. Of course, we will ask for alternative briefs so that we will know what his approach is going to be under the Harris Decision.

That is Respondent's position.

The Court: Do you have a stipulation of part of the case?

Mr. Taylor: Yes.

First, your Honor, I would like to file the original and four copies of an amended petition. A copy of this has been made available to the Respondent, and I understand that he has no objection to us filing it.

Is that correct?

Mr. Boyle: That is correct. And I ask leave to file an answer.

The Court: The amended petition and the answer may be filed.

Mr. Taylor: I would like now to file with the Court the original and a copy of a stipulation of facts. And for the record I would like to state that there is one set of exhibits to this stipulation, which is attached to the original [11] stipulation. The copy of the stipulation has no exhibits.

The Court: What are the numbers?

Mr. Taylor: They are joint exhibits and they range from Exhibit 1-A to Exhibit 12-L, inclusive.

The Court: The stipulation of facts will be received.

Mr. Boyle: If your Honor please, the Respondent objects to Paragraphs 7 and 8, as being irrelevant and immaterial in that stipulation. We have agreed to its introduction, but not as to Paragraphs 7 and 8.

(The documents above referred to were marked Joint Exhibits 1-A through 12-L, inclusive, and received in evidence.)

[Joint Exhibits 1-A through 12-L are attached to the Stipulation of Facts, pages 35-92 inclusive of this printed record.]

The Court: Call your witness.

Whereupon,

LOIS J. NEWMAN

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, testified as follows:

The Clerk: Will you state your name for the record, please?

The Witness: Lois J. Newman.

Direct Examination

Q. (By Mr. Taylor): You have a daughter by the name of Lois E. Senderman, Mrs. Newman?

A. Yes, I do. [12]

Q. Mr. Senderman was the name of your first husband, who is the father of this child?

(Testimony of Lois J. Newman.)

A. That is right.

Q. Was Richard S. Goldman your attorney?

A. Yes, he was.

Q. Over what period?

A. I would say ten or eleven years, between about 1935 until his death in '46.

Q. He committed suicide in 1946?

A. That is right, he did.

Q. Did you create a trust for your child, of which Mr. Goldman was trustee?

A. Yes, I did.

Q. Will you state the circumstances under which that trust was created?

A. It was created because in several periods of my life at that time I had had quite a bit of money, and unfortunately I had dissipated a good deal of it. And during my parents' lifetime I leaned very heavily upon my father. At the time of his death he left a considerable amount of debts, and the only asset he had was stock in the Aztec Brewing Company in San Diego, which at that time was practically worthless.

A time in 1942 came around, when due to the War the situation of the brewery in San Diego changed and things were going pretty well with the brewery, and the stock began to [13] increase in value—in fact, so much so that by the end of 1942 I was able to pay off all my debts and have a little money for the first time in several years.

Also because of the things that had happened—

(Testimony of Lois J. Newman.)

I had been married to a man who was financially irresponsible——

Q. That is Mr. Senderman?

A. That is right, the father of my daughter.

I thought that at this time I should make some provision so that in case I should remarry, or in case of my death also, to provide for the child's future in case of my death. I was very anxious that if my child was lucky enough to inherit any money from me that my former husband and her father should have no control over the money, because I considered him incapable of handling it. He had gone through a great deal of money of mine, left from my mother, not through any wish of his, but just through being incapable of handling money.

Also, I myself had been very foolish in spending and dissipating a good deal of money, and I felt that this was the last money I might ever have. So as I became solvent I spoke to Mr. Goldman, and told him that I would like to provide for Lois, my child.

He told me that he thought this was a good idea, and I discussed with him at length about how much we should give my daughter.

At the time I had this stock, but actually very [14] little money, and we came to the conclusion that I could give her about 800 shares of the brewery stock—the value was about $30,000—and that I would incur no cash outlay or no further responsibility—I mean to pay any more money.

I did this because I wanted to feel that if I was

(Testimony of Lois J. Newman.)

foolish, or remarried, that the child would be provided for. I wanted to see that she would attain maturity and have enough to be educated and have a little money to go on. I didn't think at that time —I don't think anybody did—that the stock would become as valuable as it did. I don't think anybody foresaw that. If I had known that I wouldn't have been so anxious to provide for her future, but I wanted to see that she did have something.

Mr. Goldman explained to me at great length, and wanted me to consider that if this irrevocable trust was created that no matter what I did, or no matter what happened to me, that money would be gone, that I could never have any access to this money, that it would be out of my reach forever, that the money would belong to my child and I would not be able to get it.

I told him yes, that I knew this, and that is what I really wanted, that I was very anxious that she should be provided for, that I felt very responsible, and I also felt that her father would never be able to do anything for her.

He continued to impress upon me the fact: [15] "Remember, once this is done, no matter what happens, no matter if you need the money or not, you will not be able to touch this money."

I told him yes, I wanted the trust made.

He said, "I want you to think about it. Think it over very carefully."

Q. When did all of this take place?

A. In December.

(Testimony of Lois J. Newman.)

Q. December when?

A. The end of 1942, the end of the year. It was at this time I had just come out of my financial difficulty. At the end of 1942 the brewery had made enough money so that I could pay off what I owed.

Q. I mean, this conversation that you repeated with Mr. Goldman took place in December of 1942?

A. That is right. He said, "I want you to think it over."

In January of 1943 I came to Mr. Goldman's office again and told him that I had thought it over very carefully, that I was leaving for Santa Barbara in a few weeks and I wanted the trust made for my daughter, the irrevocable trust, I wanted it fixed so that no matter what happened nobody could touch the child's money, myself included—nobody.

I was very firm that I wanted it absolutely irrevocable. I didn't want anybody able to touch the child's money, [16] myself included—particularly myself, I guess. When I was so emphatic, Mr. Goldman said, "All right, I think you have thought it over. You know what you are doing. The trust stands as of today. From today on I will be the trustee."

I left the office at that time, and he told me that he would have the proper documents drawn up, that there would be documents, and so forth. But at that time he was very busy. It was right around the holidays. And he said he would prepare the document for me later.

Q. When did you father die?

(Testimony of Lois J. Newman.)

A. 1935—June of 1935.

Q. And you inherited the stock from the estate of your father?

A. My father and my mother passed away a few months before—from both of them.

Q. Your mother died in September of '35?

A. That is right.

Q. About how many shares were there?

A. It was about a quarter interest. It was almost 2,500 shares—2,400, I guess, 2,390 and a fraction.

Q. Did you expect to remarry at the time that you made this gift?

A. I was contemplating remarrying.

Q. And at the time you had these conversations with Mr. Goldman which you state created an irrevocable trust, you had transferred the stock, the 800 shares, to Mr. Goldman's name, [17] transferred the stock, the 800 shares, to Mr. Goldman's name, had you? A. Yes.

Q. So that the stock was in his name as trustee?

A. Yes.

Mr. Boyle: He is leading, your Honor; better let the witness answer.

The Court: Your questions are very leading.

The Witness: I will say that the stock never came into my name, that all stock I received went directly into Mr. Goldman's hands. I didn't receive it myself.

As the debts were paid off——

The Court: There is no question.

(Testimony of Lois J. Newman.)

Q. (By Mr. Taylor): At the time of these conversations with Mr. Goldman—just when did these conversations take place?

The Court: I did not understand your question.

Mr. Taylor: I think it was confusing, your Honor. I shifted my question.

Let me restate that question.

Q. (By Mr. Taylor): These conversations with Mr. Goldman when the irrevocable trust was created, when did they take place?

A. Early in January of 1943.

Q. And did he agree immediately to become trustee? [18]

A. He agreed immediately as of that discussion.

Q. When were you divorced, Mrs. Newman?

A. In 1940.

Q. Did her father ever support your child?

A. Never contributed to her support.

Q. Paragraph IV of the stipulation of facts, Mrs. Newman, reads: "On or about January 1, 1943, Richard S. Goldman acquired, as trustee, 800 shares of stock in said Aztec Brewing Company in trust for Petitioner's daughter, Lois E. Senderman."

Are those 800 shares referred to in Paragraph IV the 800 shares which you caused to be transferred to Mr. Goldman? A. Yes.

Q. Had you ever lost money gambling?

A. Yes.

Q. Was that a factor in the creation of your trust?

(Testimony of Lois J. Newman.)

A. Yes, because in different periods of affluence, let's say, I had lost too much money.

Q. How did that affect your creating a trust for your daughter?

A. Well, I didn't want to—as I said before, I figured that this stock in the Aztec Brewing Company was the last money that I was ever going to have, and I wanted to put some aside for her to provide for her future.

My whole idea was to see that the trust would be [19] irrevocable, so in case I did go off on a tangent that I wouldn't be able to spend her money, or money that I wanted to be hers.

Q. Do you recall whether after the conversation with Mr. Goldman in January of 1943, at which you state that the oral irrevocable trust was created——

Mr. Boyle: Your Honor, Respondent objects to any assumption in the questioning as to an oral trust.

Mr. Taylor: I haven't asked my question yet, Mr. Boyle. You interrupted me in the middle of it.

The Court: Address the Court, not counsel, Mr. Taylor.

Mr. Taylor: I beg your pardon, your Honor.

The Court: We will hear the question, first.

Q. (By Mr. Taylor): Do you recall whether at the conversation with Mr. Goldman in January of 1943, at which you have stated the oral irrevocable trust was created—whether at that time anything was said about reducing the trust to writing?

A. Yes, I do.

(Testimony of Lois J. Newman.)

Mr. Boyle: Your Honor, Respondent objects to the question as to an oral trust. The gift tax in this case is based upon the written trust, and any mention of an oral trust is deemed immaterial and irrelevant.

The Court: It may be or may not be. Objection is [20] overruled.

Mr. Taylor: Would you please read the question to the witness, Mr. Reporter?

(Record read.)

Q. (By Mr. Taylor): Will you state please what was said in that regard?

A. To the best of my recollection, Mr. Goldman said the oral irrevocable trust would stand as of that moment. At a future date he said there were many documents to be prepared, and that he would prepare these documents for me based on the information that I had given him that day, what he wanted, that he would prepare the documents and I should sign them.

Q. Now, I will ask you to state, if you know, when the written trust was actually executed. I show you in this regard Exhibit 2-B to the stipulation of facts, which is a declaration of trust by Richard S. Goldman, as trustee. And I call to your attention that it is dated: "In Witness Whereof, I have hereunto set my hand this first day of January, 1943. Richard S. Goldman, as Trustee."

And you had purported to acknowledge receipt of the instrument also on the date, January 1, 1943.

(Testimony of Lois J. Newman.)

Now, I ask you to state, if you know, when that document, Exhibit 2-B, was actually executed.

A. It was actually executed six or seven months later, either in June or July of 1943. [21]

Q. By the way, were you in Mr. Goldman's office on January 1, 1943, New Year's day?

A. I was not.

Q. Did you read the written trust, Exhibit 2-B, when Mr. Goldman submitted it to you?

A. I looked at it, but I didn't read it carefully, because I asked Mr. Goldman if he would explain it to me and tell me about it, and he told me that it was the identical irrevocable trust that we had agreed upon early that year. And I trusted Mr. Goldman implicitly, and I signed it.

Q. You believed that you were signing a trust that was an irrevocable trust? A. I did.

Q. Mrs. Newman, I again show you Exhibit 2-B, the declaration of trust, and call to your attention the fact that this refers to Mr. Goldman having in his possession certificates for 2,396⅞ shares of stock of Aztec Brewing Company, and that he states that he holds all of these certificates of stock, all of these shares of stock, as trustee, and that the owners of said stock are Lois J. Senderman—that is you, isn't it? A. Right.

Q. (Continuing): ——as owner of 1,596⅞ shares, and Lois E. Senderman, a minor, daughter of Lois J. Senderman, as owner of 800 shares. [22]

A. That is correct.

Q. Then the balance of the trust proceeds to

(Testimony of Lois J. Newman.)

refer to the 800 shares? A. Yes.

Q. Can you explain the reference in Exhibit 2-B, "The trust to be 1,596⅞ shares"?

A. Yes, that was the balance of the stock that I received, and I made a revocable trust for myself at this time with Mr. Goldman, and I was very careful in perusing this trust, because in case I did want some money I wanted to be able to collect that from Mr. Goldman when I cared to. I didn't want that trust irrevocable. My daughter's I wanted irrevocable and mine, revocable.

Q. Who was to receive the income of the 1,596⅞ shares? A. I was.

Q. Did you create that trust at the same time that you created the trust for your daughter?

A. I think so.

Mr. Boyle: Your Honor, in order that the record may show the Respondent objects to this whole line of questioning on the oral trust, for the reason that the written trust is the best evidence.

Under the parol evidence rule the written trust speaks for itself and the witness cannot add thereto.

The Court: One of the issues stated in the petition deals with this oral trust. The Petitioner has a right to make his own presentation of proof, the same as you have in behalf of the government. This is in line with his theory of proof. We will hear the evidence.

Q. (By Mr. Taylor): Was the trust for you created at the same time that the trust for your daughter of 800 shares was created?

(Testimony of Lois J. Newman.)

A. As I recall, yes.

Q. Was the trust for you an oral trust or a written trust?

A. It was oral until a later date.

Q. Now, what happened to the 1,596⅞ shares which you transferred to Mr. Goldman under a revocable arrangement in trust for yourself?

A. He held them in trust for me until his death, paying me the income after expenses.

Mr. Boyle: Your Honor, this other trust is entirely irrelevant to the case—this other trust involving the 1,500 shares. There is nothing so far as our particular issues are that are concerned with it. It doesn't do any damage, but it is not material.

The Court: Are you advising me or are you making a motion?

Mr. Boyle: Respondent objects to it, of course.

The Court: Objection overruled.

Mr. Taylor: Would you read the question, please, Mr. Reporter?

(Record read.)

Q. (By Mr. Taylor): What happened following his death?

A. They were delivered to me personally.

Q. You mean the property which had been acquired, to wit, the 1,596⅞ shares, was returned to you? A. Yes.

Q. You revoked the trust, in other words?

A. I did.

Q. Were any Federal or State gift tax returns ever filed in connection with the trust of 1,596⅞

(Testimony of Lois J. Newman.)

shares which you created for yourself as beneficiary?

A. No, because as I understood it there was no gift, it was mine.

Q. The revocable trust, you mean?

A. Yes.

Q. Paragraph III of the stipulation of facts states that for a number of years prior to January 1, 1943, you owned as your separate property 2,396⅞ shares of stock of Aztec Brewing Company and that these represented approximately one-fourth of the issues, the outstanding stock of the corporaiton. A. That is true. [25]

Q. Now, Exhibit 3-C to the stipulation of facts, the certificate of limited partnership, on Page 3 refers to Richard S. Goldman, trustee for Lois J. Senderman, limited partner, as holding 17 per cent limited partnership interest. Now, Lois J. Senderman, that is you? A. Yes.

Q. And also it refers to Richard S. Goldman, trustee for Lois E. Senderman, limited partner—and that is your daughter?

A. That is right.

Q. (Continuing): ——as holding an 8 per cent interest as limited partner.

A. That is true.

Q. Now the stipulation will show—and I think the record will show—that in order for you to have a 17 per cent interest as a limited partner you must have owned 1,700 shares of stock; or, in other

(Testimony of Lois J. Newman.)

words, you must have acquired 103⅛ additional shares of stock in addition to the 1,596⅞ shares which you owned after the creation of the irrevocable trust for your daughter.

Now, simply to clear the record, I would like to ask you—this is my only point here, Mr. Boyle—where the other 103⅛ shares came from?

A. I purchased them in 1944.

Q. So you did not own them at the time of the trust [26] for your daughter, but you acquired them subsequently? A. That is true.

Q. And after you purchased them you added them to the revocable trust for yourself?

A. That is true.

Mr. Taylor: Your witness, Mr. Boyle.

Cross Examination

Q. (By Mr. Boyle): Mrs. Newman, why was the written trust pre-dated some six months prior to what you say was the actual execution of it?

Mr. Taylor: I object to the question. It doesn't appear in the evidence.

The Court: When you are addressing the Court, rise.

Mr. Taylor: I beg your pardon, your Honor. It doesn't appear that the witness knows why.

The Court: What is your objection to the question?

Mr. Taylor: There is nothing in the evidence to show that the witness knows why it was pre-dated.

Mr. Boyle: That is my question, your Honor.

(Testimony of Lois J. Newman.)

The Court: Will you read the question, Mr. Reporter.

(Record read.)

The Court: She may answer, if she knows. [27]

A. I actually don't know.

Q. (By Mr. Boyle): Did you read the written declaration of trust when it was executed?

A. To a certain extent.

Q. And you verified it?

A. I could tell you why I assume it.

Q. Why was the alleged oral trust created as an oral trust in January?

A. Because at that time I was leaving for Santa Barbara in a few weeks. Mr. Goldman was very busy at the time. He assured me before I left for Santa Barbara that the irrevocable oral trust was in force, that I had nothing to worry about.

I went to Santa Barbara to enter a hospital and I wanted to be sure that things were in order. But he had been very busy——

Q. When was this oral trust to end?

A. As far as I know, when my daughter attained her majority.

Q. Where were you when you had this conversation? A. In Mr. Goldman's office.

Q. Who else was present?

A. I am not quite sure. Many times that we discussed things there were people in and out. Mr. Goldman's office force was in and out at many meetings. I couldn't tell you at [28] what particular time they were in the room or not.

(Testimony of Lois J. Newman.)

Q. What did the oral trust provide as to the income on the corpus?

A. Mr. Goldman was going to hold it for my daughter's benefit at that time.

Q. Was your daughter living with you in 1943?

A. Yes. She was in boarding school, but she was living with me. I had full custody.

Q. Was she living with you in '44, '45 and '46?

A. She was still at school.

Q. Did you consider the income on the trust sufficient to maintain her?

A. At the time it was created I didn't know what it would be.

Q. Did you consider that the income was sufficient in 1945 to support her?

A. I would say that it was more than enough to support her.

Q. Did you claim your daughter as an exemption, as a dependent in your income tax returns in 1943, '45, '46 and '47?

A. I don't think so, but I don't know.

Q. I have here a copy of the original petition filed in this case, dated July 24, 1950, verified by you, Mrs. Newman. In Paragraph 4 on Page 4 you state that through inadvertence and mistake—— [29]

Mr. Taylor: If the Court please, that petition was filed by me as attorney, and it is in the record in this case. I do not see the materiality, and hence I object.

(Testimony of Lois J. Newman.)

The Court: I will hear what he has to say. Proceed.

Q. (By Mr. Boyle): You state, "Through the inadvertence and mistake of said trustee, said written declaration did not include an expressed provision that said trust was irrevocable."

Did you believe in July of 1950 that when the so-called oral trust was reduced to writing that there had been a mistake made in failing to state specifically as to revocability?

A. I certainly did.

Q. In the amended petition which has been filed today, and which you also verified on Page 4, Paragraph 3, no mention is made that a mistake had been made, but the language is, "said written declaration construed as a whole is clearly intended and designation by its terms as irrevocable and as effecting an irrevocable and complete gift."

A. May I answer in my own words?

Q. There is no question asked you yet.

A. I am sorry.

Q. Do you believe today that a mistake was made back in 1943 at the time the alleged oral trust was reduced to writing in that through error no specific mention was made as to irrevocability?

A. May I answer in my own words?

The Court: Certainly.

The Witness: The whole point of the trust was so that I could not touch it. I wouldn't have created the trust unless it was irrevocable.

Q. (By Mr. Boyle): The question is, do you

(Testimony of Lois J. Newman.)

believe today that a mistake was made in 1943, at the time the alleged oral trust was reduced to writing? A. I do.

Q. I have here in my hand a copy of a stipulation, Exhibit 11-K of the stipulation of facts, which is an order by the Superior Court of the State of California, in and for the City and County of San Francisco, stating that on the 10th day of July, 1947, you attended a hearing——

Mr. Taylor: What page is this, Mr. Boyle?

Mr. Boyle: It is Exhibit 11-K.

Mr. Taylor: What page?

Mr. Boyle: The first page.

Q. (Continuing): Do you recall attending that hearing? A. Yes, I do.

Q. Who else was present at the hearing?

A. Mr. Taylor, my attorney, Mr. Levinson, and Miss Shortall—and of course the Judge.

Q. Did you contest that proceeding? [31]

A. I don't understand exactly what you mean.

Q. The hearing was on a petition by the guardian requesting that the trust be declared irrevocable ab initio—back to the beginning of the trust. What was your position as to whether the trust should or should not be declared irrevocable?

Mr. Taylor: If the Court please, I object to the question as immaterial, irrevelant and incompetent, and not within the scope of the direct examination.

The Court: I will sustain the objection.

Mr. Boyle: Your Honor, obviously all these Su-

(Testimony of Lois J. Newman.)

perior Court petitions and orders have been introduced to foreclose this Court from passing upon the question of revocability here, because this——

The Court: I don't understand that.

Mr. Boyle: It is the Respondent's position that it was purely a consent decree, without any formal or real contest.

The Court: You are cross examining this witness at the present time. This is not your witness, unless you wish to make her your witness. There was no testimony on the direct about this matter.

Mr. Taylor: Furthermore, your Honor, these exhibits——

The Court: Just a moment. [32]

Mr. Boyle: Respondent wishes to introduce in evidence at this time the personal income tax returns of the witness for the calendar years '43, '45, '46 and '47, and requests leave that they be withdrawn and photostatic copies be substituted.

The Court: You have no objection?

Mr. Taylor: I have no objection at all to that.

The Court: Exhibits M, N, O, and P.

Mr. Taylor: But I would like to look at them, if you plan to use them as a basis of examination.

(The documents above referred to were marked Respondent's Exhibit Nos. M, N, O and P and were received in evidence.)

Mr. Taylor: Where is 1944, Mr. Boyle?

Mr. Boyle: We are not introducing 1944.

Mr. Taylor: I would then like to have you

(Testimony of Lois J. Newman.)

make 1944 available to me, and I would also like to have you make the returns of the trust and of the guardianship available to me, and of the minor, so that I may introduce them if I desire to do so. Just to introduce the returns of Mrs. Newman, that gives just a partial picture.

This comes as a surprise to me, so I have not requested these of you heretofore.

Mr. Boyle: Your Honor, of course the Respondent wanted these cases to be consolidated, and in fact this particular gift tax case was continued over one calendar so they [33] could be consolidated, but at the instance of the Petitioner they have not been consolidated at this time. Those would have been introduced, of course.

Mr. Taylor: Mr. Boyle, I have no objection to the introduction of the returns. I don't see their materiality, but I am very happy to introduce them if you want to introduce them.

The Court: They have been received in evidence. Anything you want to submit, you can take proper steps to procure it. There is no obligation on the Government to introduce any evidence that you may speak of.

Mr. Taylor: Your Honor, I would then like to have an agreement with Mr. Boyle that he will make avaible to me for introduction the returns of the trust, the minor and the guardianship and also the return for 1944.

The Court: That is something you can take up later. You may proceed.

(Testimony of Lois J. Newman.)

Mr. Taylor: And then one other thing——

The Court: Just a minute. Mr. Boyle has the floor, so to speak, and he has just introduced these returns. Proceed.

Q. (By Mr. Boyle): Mrs. Newman, what were the provisions of the oral trust with respect to the rights of the trustee, the powers of the trustee to resign and discharge himself? [34]

A. Will you explain a little more fully, please?

Q. Yes. What was the nature of the trustee's right to resign and discharge himself of the duties of the oral trust?

A. I think that if he resigned he was to appoint, or have appointed by the court, another trustee until my daughter assumed her majority—or should I say another guardian? It is a little technical for me.

Q. Who was present when the oral trust was discussed.

A. I think I told you that I was not certain, that many people in Mr. Goldman's office came back and forth out of the room. When I discussed my daughter's affairs with Mr. Goldman usually someone from the office was present. When we discussed my personal affairs there wasn't. So I don't actually know.

Q. Mr. Goldman was an attorney?

A. Right.

Q. Did Mr. Goldman suggest that this trust be oral in nature? A. No, he did not.

Q. Did you suggest that it be oral?

(Testimony of Lois J. Newman.)

A. I don't know anything about trusts. If I did I would have insisted that the word "irrevocable" be written in.

Q. Upon whose instance was the so-called oral trust reduced to writing? [35]

A. I think I have explained, the oral trust was created because Mr. Goldman was very busy at the time, and I wanted it to go into effect immediately. I had full and explicit confidence in Mr. Goldman. He handled all of my affairs for me, with no bounds, no anything. I took his word.

Mr. Boyle: That is all, your Honor.

The Court: Do you have any other questions of this witness?

Mr. Taylor: Yes, I have a couple.

The Court: Proceed.

Redirect Examination

Q. (By Mr. Taylor): Was Miss Shortall present at the time of the conference at which the oral trust was created?

A. She might have been.

The Court: Have you any other questions?

Mr. Taylor: I have one more, your Honor.

The Court: Let us hear it.

Mr. Taylor: No, I have no more questions of this witness.

The Court: You are excused.

(Witness excused.)

Mr. Taylor: If the Court please, I find from an examination of these returns that what we have

here is not simply the return, but a great many things which have nothing to [36] do with the return, such as protests, for example, and other material.

I would suggest that it might save time if I could have a few minutes to look these over, and Mr. Boyle and I could doubtless agree.

The Court: We will take a brief recess.

(Short recess.)

The Court: You may proceed.

Mr. Taylor: I offer in evidence the income tax return for Lois J. Senderman for the calendar year 1944, and I ask leave for it to be withdrawn and photostat substituted therefor.

The Court: That may be done. Have you any objection?

Mr. Boyle: No objection, your Honor.

The Court: It may be received and marked Exhibit No. 13.

(The document above referred to was marked Petitioner's Exhibit No. 13 and received in evidence.)

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File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (item 8, below) must be paid in full with return. See separate instructions for filing out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

1944

For fiscal year beginning ..... 1944, and ending 1945

Do not write in these spaces

2 621

5551

1 Cash

RECEIVED
JAN 15 1945
COLL. INT. REV.

94

CURRENT ADDRESS

Refunded $ .....

Credited $ 10,862.60

Voucher 2223

EMPLOYERS.—Husband of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME Lois J. Senderman
(PLEASE PRINT) (If this return is for a husband and wife, use both first names)

(formerly 975 Bush Street)

ADDRESS (new) c/o Richard S.Goldman, 1111 Mills Tower
(PLEASE PRINT Street and number or rural route)

San Francisco, Calif.
(City or town, postal zone number) (State)

Social Security No. (if any)

1. List your own names. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list names of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500, who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent [illegible]

Your Exemptions

NAME (Please print)	Relationship	DIV.	MARRIED	Relationship
Your name Lois J.Senderman				

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ACCOUNT OF THE U.S.

JUL 15

2. Enter your total wages, salaries, bonuses, commissions, and other [illegible] in 1944. RECORD PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming travelling or reimbursed expenses, see instructions 2.

Your Income

PRINT EMPLOYER'S NAME	WHERE EMPLOYED (CITY AND STATE)	AMOUNT	
Aztec Brewing Co.	San Diego,Cal.	$ 1800.	00
	Enter total here →		$ 1800. 00

3. Enter here the total amount of your dividends and interest including interest from Government obligations unless wholly exempt from taxation) 112. 50

4. If you received any other income, give details on page 3 and enter the total here 17,944. 39

5. Add amounts in items 2, 3, and 4, and enter the total here ..... $ 19,856. 89

If item 5 includes income of both husband and wife, show husband's income here, $ ..... ; wife's income here, $ .....

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the tax table on page 2. This table, which is provided by law, is based on the same but rates as are used in the Tax Computations on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to [illegible] your tax on page 4.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4 ..... $ 6882. 94

7. How much have you paid on your 1944 income tax?

(A) By withholding from your wages (Attach Withholding Receipts, Form W-2) $ 297. 60

(B) By payments on 1944 Declaration of Estimated Tax 17,447. 94

Enter total here → 17,745. 54

8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here ..... $

9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here ..... $ 10,862. 60

Check (✓) whether you want this overpayment: Refunded to you ☐ or Credited on your 1945 estimated tax ☑

If you filed a return for a prior year, what was the latest year? 1943

To which Collector's office was it sent? 1st Dist. of Calif.

To which Collector's office did you pay the amount claimed in items 7 (B), above? 1st Dist. of Cal.

Is your wife (or husband) making a separate return for 1944) If "Yes," write below: ("Yes" or "No")

Name of wife (or husband)

Collector's office to which sent

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature of person (other than taxpayer or agent) preparing return) Date

(Name of firm or employer, if any)

(Signature of taxpayer) 1-15-45 (Date)

(If this is a joint return of husband and wife, it must be signed by both)

(SEE TAX TABLE BELOW)

Petitioner's Exhibit No. 13—(Continued)

* * * * *

SCHEDULE E.—Income From Partnerships, Estates and Trusts, and Other Sources:

1. Name and address of partnership, syndicate, etc.
2. Name and address of estate or trust: Lois J. Senderman Trust (Aztec Brewing Company interest) (Fiduciary Return attached).....$19,347.64
3. Other Sources (see attached schedule).. 1,403.25

Total.....$17,944.39

Total income from above sources (Enter as items 4, page 1) $17,944.39

SCHEDULE E.—Other sources (state nature):

Face value of bonds	Date Acquired	Name of Bond	Cost including Commission	Call Price	Amortization
$5000.00	9-13-44	Great Northern Ry Co. Gen Mtg. 4% Conv. Series "G"	$5178.25	$5050.00	$128.25
$5000.00	9-13-44	Nebraska Power Co. 1st Mtg. G.B. 4½% due 81	$5412.50	$5250.00	$162.50
$10000.00	9-14-44	Commonwealth Edison Co. 3½% conv. due 58	$11,325.00	10,212.50	1112.50

Total.....$1,403.25

DEDUCTIONS

Contributions—See attached schedule.

Total Deductions.....$1101.64

Petitioner's Exhibit No. 13—(Continued)

DEDUCTIONS

Contributions:		
Community Chest	$ 50.00	
A. V. W. S.	50.00	
American Red Cross	35.00	
Hadassa	5.00	
Tuberculosis	5.00	
S. F. Council of Jewish Women	5.00	
War Orphan Scholarship	10.00	$ 160.00
Interest:		
Merrill Lynch, Pierce, Fenner & Beane, interest paid upon purchase of bonds		$ 175.47
Taxes:		
Automobile licenses (2 cars)	$ 31.70	
State of Calif. 1943 tax	413.22	
State of Calif. Sales Tax 2½%	283.45	
Safe Deposit box	19.80	
State of Calif. Unemployment	18.00	$ 766.17
Total		$1,101.64

TAX COMPUTATION—For Persons not using Tax Table on page 2:

1.	Enter amount shown in item 5, page 1. This is your Adjusted Gross Income	$19,856.89
2.	Enter Deductions (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000.00 or more and deductions are not itemized, enter the standard deduction of $500)	1,101.64
3.	Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$18,755.25
4.	Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	500.00
5.	Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income	$18,255.25

Petitioner's Exhibit No. 13—(Continued)

6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here	$ 6,335.28
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$18,755.25
8. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)	500.00
9. Subtract line 8 from line 7, and enter the difference here	$18,255.25
10. Enter here 3 percent of line 9. This is your Normal Tax	$ 547.66
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)	$ 6,882.94
* * * * *	
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax	$ 6,882.94

NOTICE OF INSTALLMENT DUE

Income and Victory Tax Estimated on Declaration for Current Taxable Year

Lois J. Senderman, 975 Bush St., San Francisco, Cal. 8304266

Under the Current Tax Payment Act, the total amount of the unpaid balance of your estimated tax for the current year, as entered hereon, will be due on the date indicated: Last Credit, 5815.98; Total Unpaid Balance, 5815.98.

This installment must be paid on or before Jan. 15, 1945.

If it is not paid on time, a penalty will be incurred.

To insure proper credit, please return this form with remittance to: 100 McAllister Street, San Francisco, California.

Collector's Paid Stamp: Received Jan. 15, 1945, Coll. Int. Rev. 1st Dist. Cal. 94.

Mr. Boyle: I introduce into evidence, your Honor, the income tax return of Lois E. Senderman, a minor, for 1943, 1946 and 1947, and also the fiduciary income tax of the trust of Lois E. Senderman, a minor, for the calendar year 1945, and request permission that they be withdrawn and photostat substituted. [37]

The Court: That may be done in all cases. Exhibits Q, R, S and T.

(The documents above referred to were marked Respondent's Exhibit Nos. Q, R, S, and T and received in evidence.)

Mr. Taylor: And I will offer into evidence the income tax return for Lois E. Senderman, a minor, for the year 1944, and ask leave for it to be withdrawn.

The Court: Leave is granted to substitute all these documents. Exhibit 14.

(The document above referred to was marked Petitioner's Exhibit No. 14 and received in evidence.)

FIELD

File this return with Collector of Internal Revenue on or before March 15, 1945. Any balance of tax due (Item 8, below) must be paid in full with return. See separate Instructions for filling out return.

Page 1

FORM 1040
Treasury Department
Internal Revenue Service

U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1944

1944

For fiscal year beginning ..... 1944, and ending 1945

Do not write in these spaces
File No. 2657
Serial No. 012556
Form 1040
INT. REV.
DIST. CAL.

EMPLOYEES.—Instead of this form, you may use your Withholding Receipt, Form W-2 (Rev.), as your return, if your total income was less than $5,000, consisting wholly of wages shown on Withholding Receipts or of such wages and not more than $100 of other wages, dividends, and interest.

NAME Lois E. Senderman, a Minor
c/o Richard S. Goldman,
ADDRESS 1111 Mills Tower,
(PLEASE PRINT. Street and number or rural route)
San Francisco, 4, Calif.
(City or town, postal zone number) (State)
Social Security No. (if any)

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than $500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.

Your Exemptions

NAME (Please print)	Relationship	NAME (Please print)	Relationship
Your name Lois E.Senderman			

JUL 17 1946

2. Enter your total wages, salaries, bonuses, commissions, fees, and other compensation received in 1944, BEFORE PAY-ROLL DEDUCTIONS for taxes, dues, insurance, bonds, etc. Members of the Armed Forces should report base pay and subsistence and not quarters allowances. (See Instructions 2.)

Your Income

PRINT EMPLOYER'S NAME	PRINT EMPLOYER'S ADDRESS (NUMBER AND STREET)	AMOUNT	
		$	
		Enter total here ⇒ $	

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3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation) .....

4. If you received any other income, give details on page 3 and enter the total here 19,065. 04

5. Add amounts in items 2, 3, and 4, and enter the total here ..... $ 19,065. 04

If item 5 includes income of both husband and wife, show husband's income here, $ ..... ; wife's income here, $ .....

How to Figure Your Tax

IF YOUR INCOME WAS LESS THAN $5,000.—You may find your tax in the last table on page 2. This table, which is provided by law, is based on the same tax rates as are used in the Tax Computation on page 4. The table automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, casualty losses, medical expenses, and miscellaneous expenses. If your expenditures and losses of these classes amount to more than 10 percent, it will usually be to your advantage to itemize them and compute your tax on page 4.

IF YOUR INCOME WAS $5,000 OR MORE.—Disregard the tax table and compute your tax on page 4. You may either take a standard deduction of $500 or itemize your deductions, whichever is to your advantage.

HUSBAND AND WIFE.—If husband and wife file separate returns, and one itemizes deductions, the other must also itemize deductions.

Tax Due or Refund

6. Enter your tax from table on page 2, or from line 15, page 4		$ 5776.	42
7. How much have you paid on your 1944 income tax?			
(A) By withholding from your wages (Attach Withholding Receipts, Form W-2)	$ 6013. 56		
(B) By payments on 1944 Declaration of Estimated Tax			
Enter total here ⇒		6013.	56
8. If your tax (item 6) is larger than payments (item 7), enter BALANCE OF TAX DUE here		$ 762.	86
9. If your payments (item 7) are larger than your tax (item 6), enter the OVERPAYMENT here		$	

Check (✓) whether you want this overpayment: Refunded to you ☐; or Credited on your 1945 estimated tax ☐

If you filed a return for a prior year, what was the latest year? 1943

To which Collector's office was it sent? 1st Dist of Cal.

To which Collector's office did you pay amount claimed in item 7 (B), above? 1st Dist of Cal.

Is your wife (or husband) making a separate return for 1944? ("Yes" or "No")

If "Yes," write below:

Name of wife (or husband) .....

Collector's office to which sent .....

Under the penalties of perjury, I declare that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

William Taubman 1-15-45 Lois E. Senderman 1-1-45
(Signature of taxpayer, if any) (Date) Richard S. Goldman, Trustee (Date)
1111 Mills Tower, San Francisco
(If this is a joint return of husband and wife, a name is required by law)

CHECK TAX TABLE BELOW

Petitioner's Exhibit No. 14—(Continued)

* * * * *

SCHEDULE E—Income from Partnerships, Estates and Trust, and Other Sources:

1. Name and address of partnership, syndicate, etc.
2. Name and address of estate or trust:
   Lois E. Senderman, a Minor..... $20,427.54
   (Fiduciary Return attached)
3. Other sources (see attached schedule).. (1,362.50)
   Total.....$19,065.04

Total income from above sources
(Enter as item 4, page 1).....$19,065.04

* * * * *

SCHEDULE E—Other Sources (state nature):

Face value of bonds	Date Acquired	Name of Bond	Cost including Commission	Call Price	Amortization
$5000.00	9-19-44	Amer. Tel & Tel 3% due 56	$6037.50	$5200.00	$837.50
$5000.00	9-13-44	Nebraska Power Co. 1st Mtg. G.B. 4½% due 81	$5412.50	$5250.00	$162.50
$5000.00	9-13-44	Safe Harbor Water Power Corp. 4½% 1st Mtg. SFGB due 79	$5512.50	$5150.00	$362.50

Total.....$1,362.50

* * * * *

TAX COMPUTATION—For Persons not using Tax Table on Page 2

1. Enter amount shown in item 5, page 1. This is your Adjusted Gross Income.....$19,065.04
2. Enter Deductions (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is $5,000.00 or more and deductions are not itemized, enter the standard deduction of $500)..... 500.00

Petitioner's Exhibit No. 14—(Continued)

3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income	$18,565.04
4. Enter your Surtax Exemptions ($500 for each person listed in item 1, page 1)	500.00
5. Subtract line 4 from line 3. Enter the difference here. This is your Surtax Net Income	$18,065.04
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter the amount here	$ 6,234.47
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)	$18,565.04
8. Enter your Normal-Tax Exemption ($500 if return includes income of only one person; otherwise see Tax Computation Instructions)	500.00
9. Subtract line 8 from line 7, and enter the difference here	$18,065.04
10. Enter here 3 percent of line 9. This is your Normal Tax	$ 541.95
11. Add the figures on lines 6 and 10, and enter the total here. (If alternative tax computation is made on separate Schedule D, enter here tax from line 15 of Schedule D)	$ 6,776.42
* * * * *	
15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax	$ 6,776.42

Mr. Taylor: Mr. Boyle, with regard to the returns which you have introduced into evidence, will you make photostats available to me, please?

Mr. Boyle: That will be done.

The Court: Call your next witness.

Mr. Taylor: Miss Shortall, will you take the stand, please.

Whereupon,

CLARISSA SHORTALL

was called as a witness by and on behalf of the Petitioner, and having been first duly sworn, testified as follows:

The Clerk: Will you state your name, please.

The Witness: Clarissa Shortall. [38]

Direct Examination

Q. (By Mr. Taylor): You are the guardian of the estate of Lois E. Senderman, a minor?

A. Yes.

Q. You are an attorney? A. Yes.

Q. And a member of the State Bar of California? A. Yes.

Q. How long have you been a member of the California State Bar?

A. Since May of 1935.

Q. Were you ever associated with Richard S. Goldman as an attorney? A. Yes.

Q. How long were you so associated?

A. From the first of October 1942, until the time of his suicide, March 1, 1946.

Q. Did you work for Mr. Goldman in his office during all of that period? A. Yes.

Q. You were his right-hand man?

A. Yes, I was.

Q. Or woman, I should say. Did you work for

(Testimony of Clarissa Shortall.)

Mr. Goldman in matters pertaining to Mrs. Lois J. Senderman, now known as Mrs. Lois J. Newman, the Petitioner in this case? [39]

A. Yes, I did.

Q. When did you first begin to handle matters for Mrs. Newman?

A. As soon as I started to work with Mr. Goldman in 1942.

Q. Did you work closely with Mr. Goldman?

A. Yes, I did; I worked very closely with him. I was the only other attorney in the office, and was very familiar with all of the matters in the office, including Mrs. Newman's and her daughter.

Q. Will you state whether you were concerned with any matters for Mrs. Newman in late 1942 or in early 1943, and thereafter in 1943?

A. Yes, I was. Mrs. Newman was discussing the matter of a trust for her daughter, and Mr. Goldman discussed this matter with me and asked me to work on it with him.

Q. When was that?

A. That was in late '42 and in '43, continuing.

Q. By late '42, you mean December?

A. I would say December of '42, and then on into '43.

Q. Will you state, if you know, what was the outcome of the discussions with regard to a trust for her daughter. A. Yes.

Q. That is, for Mrs. Newman's daughter?

A. Yes. In 1943, I would say the first week in [40] January, there was a meeting in Mr. Gold-

(Testimony of Clarissa Shortall.)

man's office with Mrs. Newman, Mr. Goldman and myself, at which time the matter of the trust was finally brought to a head, and Mrs. Newman stated that she wanted an irrevocable trust.

Q. She wanted what?

A. An irrevocable trust for her daughter. And Mr. Goldman consented to act as trustee, and reminded Mrs. Newman at that time that if she did create such a trust that she must realize that she could never get the property back in any way, and that she could never assume any control over it.

Q. Paragraph IV of the stipulation of facts states that on or about January 1, 1943, Richard S. Goldman acquired as trustee 800 shares of stock in Aztec Brewing Company, in trust for Petitioner's daughter, Lois E. Senderman. At the conclusion of the conversation that you referred to, had that stock been transferred to Mr. Goldman as trustee?

A. Yes, that was covered in the 1942 conversations. All of Mrs. Newman's inheritance from her father and mother, which was in the sum of 2,400 shares of stock in the Aztec Brewing Company were transferred into Mr. Goldman's name as trustee.

In 1943, this conversation I have just referred, Mrs. Newman decided to give to her daughter 800 shares of this particular stock and create a trust with Mr. Goldman as trustee.

Q. Can you state whether that conversation you [41] referred to pertained to the creation of a

(Testimony of Clarissa Shortall.)

trust in the future, or the creation of a trust immediately?

A. Definitely it would pertain to the creation of a trust immediately, because Mrs. Newman was going away.

She was not well, and she was going into a hospital in Santa Barbara, and she was most anxious to have this all settled before she left; so she stated that day that she wanted the trust immediately, and Mr. Goldman said, "You can count on it as being in effect from this day on."

Q. Did Mr. Goldman agree to hold immediately the 800 shares as trustee in an irrevocable trust?

A. Yes.

Q. Did he explain to Mrs. Newman what an irrevocable trust meant?

A. Yes, very clearly.

Q. Do you recall what was said?

A. Yes. He told her that she must realize that if she made this gift to her daughter that no matter what she did or what happened to her own finances, or what kind of a jam she might get into, that she never could touch this money, the stock, or its income; that not only could she not get the money back in any way, but she could never assume any control over it whatsoever.

She agreed to that, and said that is what she wanted. [42]

Q. Was anything said about reducing the trust to writing, or about putting the trust into writing?

A. Yes. Mr. Goldman said that he would put

(Testimony of Clarissa Shortall.)

it in writing some time in the future. He was very busy at that time. He said that she could rely on its being in existence then.

Q. You mean at once?

A. Immediately, yes.

Q. Will you state whether Mr. Goldman was the kind of a lawyer who was always behind in his work?

A. Very definitely. He practiced alone. I was the only assistant.

Mr. Boyle: Your Honor, I object to that as asking for an opinion of the witness.

The Court: I don't think there is any harm in having it in the record. We will let it stand.

Mr. Taylor: Would you read the answer, please, Mr. Reporter?

(Record read.)

Q. (By Mr. Taylor): Will you state, if you know, how long Mr. Goldman has practiced in San Francisco?

A. Approximately thirty years at that time.

Q. Did he have a successful practice?

A. A highly successful practice. [43]

Q. State, if you know, whether he had prepared many trust instruments?

A. There were many trust instruments and wills, and other matters.

Q. He had created many trusts by instrument or otherwise? A. Yes.

Q. Will you state, if you know, whether he was especially busy at the beginning of the year 1943?

(Testimony of Clarissa Shortall.)

A. Yes. The month of January was always a very busy month in the office. There was a great deal of probate work in the office, which meant end-of-the-year accountings.

In addition, we did a lot of tax work, and in January all of the tax returns were started. So that January and February were very heavy months always in the office.

Q. Will you state, if you know, when the trust was actually reduced to writing, put into writing? And in that regard, I show you Exhibit 2-B to the stipulation of facts, the document in which Mr. Goldman declared himself trustee for the minor, Lois E. Senderman, and call your attention to the fact that it is stated therein: "In Witness Whereof, I have hereunto set my hand this 1st day of January, 1943," and that Lois J. Senderman acknowledged receipt, and the acknowledgment of receipt of this document is dated January 1, 1943.

Mr. Boyle: Your Honor, the Respondent objects on [44] the grounds that the question was asked as if he wanted present recollection; and if he, on the other hand, wants past recollection he has not laid the proper foundation to get that.

The Court: Will you read the question, please, Mr. Reporter.

(Question read.)

The Court: She may answer the question.

A. The trust was put in final form and executed, to the best of my recollection, in June or maybe early July of 1943.

(Testimony of Clarissa Shortall.)

Q. (By Mr. Taylor): Was receipt acknowledged by Mrs. Newman at that time?

A. At the same time, yes.

Q. Was Mr. Goldman's office open on January 1, 1943? A. No.

Q. Will you state, if you know, the reason for the delay in the execution of a written trust?

A. Mr. Goldman was very busy, and he didn't seem to feel that there was any urgency in reducing this to writing, because he felt that there was already an irrevocable oral trust in effect, and he was so acting.

The Court: Who drew this trust?

The Witness: Mr. Goldman with by assistance to some extent.

The Court: Did you assist him in drawing up the [45] final draft?

The Witness: I should say the final draft was Mr. Goldman's, not mine.

Q. (By Mr. Taylor): Will you state, if you know, how it happened that the trust, Exhibit 2-B, as finally executed did not expressly use the word "irrevocable"?

A. Mr. Goldman felt that it was irrevocable on its face, the various provisions in the trust made it irrevocable, and that there was no necessity to use the actual word "irrevocable".

Q. I show you Exhibit 2-B, the trust, and ask that you read into the record——

The Court: That is already in the record.

(Testimony of Clarissa Shortall.)

Mr. Taylor: The trust itself is in the record, yes, your Honor.

Q. (By Mr. Taylor): I ask that you point out the provisions on which, if you know, Mr. Goldman relied?

Mr. Boyle: That is objected to as asking for an opinion. Mr. Goldman is not here. What he relied upon is certainly a nebulous thing, which we couldn't get into at this time. The record is the best evidence of that. Whatever the trust instrument is, that is the best evidence.

The Court: That is a matter for argument, I think, [46] on brief.

Mr. Taylor: If your Honor please, a very basic question in this case is whether or not this written trust is expressly made irrevocable. Evidently the Government thinks there is some question about it, because it has determined that that is not the case.

Now, under those circumstances, I respectfully submit that we are entitled to have oral evidence as to what was meant by the words used here.

The Court: That document is already in evidence. It speaks for itself.

Mr. Boyle: If your Honor please, we have a case in this circuit on this very point that has said that parol evidence cannot be introduced for this purpose. It is the case of Gaylord vs. The Commissioner, 153 Fed 2nd 408.

Mr. Taylor: Your Honor, I think it is clear that where the document is ambiguous parol evidence may be introduced.

(Testimony of Clarissa Shortall.)

The Court: Wherein is the document ambiguous?

Mr. Taylor: Well, we do not think it is, but evidently the Commissioner does because he has challenged its interpretation.

The Court: I will sustain the objection to the question that was raised.

Mr. Taylor: May I have an exception, your Honor. [47] I would like to make an offer of proof, your Honor.

The Court: Go ahead.

Mr. Taylor: I would like to state that if this witness were permitted to answer, she would testify that Mr. Goldman relied upon Paragraph II, III and V of the trust, as expressly making it irrevocable.

The Court: Did Mr. Goldman mention these three sections to you as making it irrevocable?

The Witness: Yes, he did, your Honor, not as those particular sections, but the provisions that were in those sections.

The Court: I asked you about those sections.

The Witness: Yes, I know what those sections contain.

Mr. Taylor: If your Honor please, I would like to call your attention to Chamberlayne on Trial Evidence, Section 853, page 813, which states that parol evidence is properly admitted as an aid in the interpretation of a writing for the purpose of explanation. That is my object in asking this question of the witness.

(Testimony of Clarissa Shortall.)

The Court: I am familiar with it.

Mr. Taylor: May I ask your Honor to reconsider your ruling?

The Court: Proceed with your offer of proof?

Mr. Taylor: I have made my offer of proof, your [48] Honor, that if this witness were permitted to answer she would testify that Mr. Goldman relied on what is in Paragraphs II, III and V of Exhibit 2-B as expressly making that trust, Exhibit 2-B irrevocable.

The Court: Proceed.

Q. (By Mr. Taylor): I show you Exhibit 4-D to the stipulation of facts, petition for appointment of successor trustee or trustees in place of the deceased trustee in the matter of the irrevocable trust of Lois E. Senderman, beneficiary, and Lois J. Senderman, donor and trustor and Richard S. Goldman, trustee; and I call to your attention that in Paragraph I of that Exhibit, which you executed as attorney for the Petitioner, you state that on the first day of January, 1943, Lois J. Senderman, as trustor and donor, and Richard S. Goldman, as trustee, executed a trust indenture; and it is obvious that you are referring to what is Exhibit 2-B in this stipulation of facts.

Now, I ask you what you meant by that allegation that that was executed on the first day of January, 1943.

A. I meant that it was executed as of January 1, 1943; the oral irrevocable trust had been created as of that time.

(Testimony of Clarissa Shortall.)

Q. You did not mean that this written instrument was actually executed on that date?

A. No.

Q. That instrument, you testified, was executed some six or seven months later? [49]

A. Yes.

Q. I show you Exhibit 6-F to the stipulation of facts, Petition for Appointment of Guardian of Minor, and I call to your attention that on Page 2 of that exhibit, in the third full paragraph, it is stated that on the first day of January, 1943, Richard S. Goldman, as trustee, executed a trust indenture—and that trust indenture, it is obvious from the balance, is Exhibit 2-B to this stipulation of facts.

Now, let me state that that exhibit is signed by Richard N. Goldman, executor of the estate of Richard S. Goldman, deceased, and signed by A. B. Bianchi, as attorney for the Petitioner, and it was filed with the Superior Court on May 2, 1946.

Were you associated with Mr. Bianchi at that time?

A. Yes, for a short while after Mr. Goldman's death, I was.

Q. Did you prepare that petition?

A. Yes, I did.

Q. Will you state you meant by the reference to the trust being executed on January 1, 1946?

A. I meant that it was executed as of January 1, 1946—pardon me, '43. You mean '43, don't you, Mr. Taylor?

Q. I meant to say 1943, Miss Shortall.

(Testimony of Clarissa Shortall.)

A. The oral irrevocable trust was already in effect.

Q. I show you Exhibit 9-I to the stipulation of facts, [50] Petition by Guardian for Instruction, which was filed on April 22, 1947, with the Superior Court, and which you signed as the guardian.

I call your attention to Paragraph II on page 1 of this exhibit, where it is stated that on the first day of January, 1943, Lois J. Senderman, now Lois J. Newman, the mother of said minor, Lois E. Senderman, as trustor and donor, and Richard S. Goldman, as trustee, executed a declaration of trust. It is apparent from what follows that that declaration of trust is the same as Exhibit 2-B to this stipulation of facts.

I ask you what you meant by this statement that that document was executed on the first day of January, 1943?

A. I meant that it was executed as of the first day of January, 1943.

Q. But not actually on that date?

A. No, not actually on that date.

Q. But actually some six or seven months later?

A. Yes.

Q. Was that made clear in the amended petition which you filed?

A. Yes, I think I clarified that in the amended petition, by showing that the document was executed some six or seven months later and dated as January 1, but was actually executed later. [51]

Q. Now, by the amended petition you mean Exhibit 10-J with the stipulation of facts?

(Testimony of Clarissa Shortall.)

A. Yes, that is right—2-B.

Q. The stipulation of the trust? A. 2-B.

Q. The stipulation of facts, Paragraph XIV, commencing on Page 4, states that on May 2, 1946, said Court—meaning the Superior Court of the State of California, in and for the City and County of San Francisco—issued its order appointing Clarissa Shortall as guardian of the estate of the said Lois E. Senderman.

There are attached to the stipulation as exhibits copies of the order appointing you as guardian, and of the letters of guardianship which were issued to you you on May 2, 1946.

I now ask you whether any assets of the trust for the minor, Lois E. Senderman, were transferred to you, and if so, when they were transferred.

A. They were transferred upon order of Court on the day of my appointment as guardian of the estate of Lois E. Senderman, a minor.

Q. That is, on May 2, 1946?

A. May 2, 1946.

Q. Was that transfer made solely pursuant to the Court Order appointing you a guardian?

A. Yes. [52]

Q. Until that Court Order you did not in your capacity as guardian have possession of those assets? A. No.

Mr. Boyle: Respondent objects to that. These questions are leading, and ask for conclusions of law rather than of fact.

(Testimony of Clarissa Shortall.)

The Court: Will you kindly refrain from leading questions?

Mr. Taylor: Very well, your Honor.

Q. (By Mr. Taylor): Will you state, if you know, whether Mrs. Newman had anything to do with the transfer to you of the assets of the trust on May 2, 1946?

A. Mrs. Newman had nothing to do with this entire matter of the transfer to the guardian of the assets belonging to the estate of Lois E. Senderman.

Q. Will you state whether that was true, not only on May 2, 1946, but at all other times?

A. Yes.

Q. Did she take any action with regard to such transfer? A. No.

Q. Paragraph XVI of the stipulation of facts states that on July 10, 1947, a hearing was held before the Hon. T. I. Fitzpatrick, Judge of the Superior Court—by that it meant the [53] California Superior Court—on the amended petition, which is attached as Exhibit 10-J to this stipulation; and that evidence, both oral and documentary was offered; and that the Court issued its Order pursuant to said amended petition.

Now, I ask you to state whether or not the issue as to if Mrs. Newman had created an irrevocable trust for her daughter was fully argued?

A. Yes, it was. Mrs. Newman had her own counsel at that hearing and the Court asked her many questions, as well.

(Testimony of Clarissa Shortall.)

Q. Now, will you state how you happened to file a petition for instructions with the Superior Court, Exhibit 9-I to the stipulation of facts, and the amended petition, Exhibit 10-J?

A. Yes. The Internal Revenue Agent at that time had raised the question.

Mr. Boyle: If your Honor please, the witness is not testifying from notes, is she?

The Witness: I haven't any—a handkerchief.

The Court: Proceed.

Q. (By Mr. Taylor): The answer to Mr. Boyle's question is "no"?

A. No. The Internal Revenue Agent about that time had raised the question of the irrevocability of the trust for Lois E. Senderman, the minor. Up until that time neither I, nor Mr. Goldman, nor Mrs. Newman had ever considered the trust could [54] possibly be revocable.

Q. Could be what?

A. Revocable. When Mr. Goldman died, shortly thereafter—I believe it was in the month of May 1946—I turned over to Mrs. Newman some $205,000 in cash and securities, which had been held by Mr. Goldman as trustee.

Q. You mean trustee for Mrs. Newman?

A. For Mrs. Newman, yes.

Q. That is the revocable trust referred to?

A. That is the revocable trust for Mrs. Newman. In addition, she received the 17 per cent interest in the partnership of the Aztec Brewing Company.

From May of 1946 until about June of 1947,

(Testimony of Clarissa Shortall.)

Mrs. Newman in addition had received some $320,000 in distribution of partnership profits from the Aztec Brewing Company.

Q. That represented her share?

A. That represented her share, 17 per cent interest partner.

In 1947, in spite of receiving all of this money, Mrs. Newman requested an allowance for the support of her daughter. Until the end of 1946 she had assumed the full support of her daughter, and the daughter's assets were accrued. Nothing was spent personally for the daughter.

Q. You mean accumulated? [55]

A. Accumulated, yes; I am sorry.

And her reason for asking for an allowance, which she suggested be $7,500 a year, was that she was not financially able to take care of her daughter at that time.

For that reason, and because of other knowledge that I had, I realized that Mrs. Newman was spending a great deal of money. I knew that Mrs. Newman gambled. And I was rather concerned that she might find herself in a position where, because of the suggestion that was put in her mind by the Internal Revenue Agent that the trust could be revoked, she might be tempted to revoke the trust, and get some of the money back.

Q. You mean she might try to?

A. Yes. For that reason, I thought it would be a very good idea to have a ruling of the Superior Court, under whose jurisdiction I was as guardian,

(Testimony of Clarissa Shortall.)

regarding the particular document, whether it was revocable or irrevocable.

This, of course, had nothing to do with the taxes, but as a secondary motive I wanted to have it satisfied once and for all that the trust was irrevocable, because of the contentions of the Revenue Agent.

Q. Now, when you are referring to the Revenue Agent's examination, and his contention that the trust was revocable, do you mean his examination of the gift tax return for 1943, or of the income tax returns for 1943 and subsequent years? [56]

A. In my recollection, at the end of '46, or the beginning of 1947, the income tax returns for the minor for the years '43, '44, and I believe '45, were being examined.

Q. Is that true also of the income tax returns of Mrs. Newman?

A. Yes, they were all examined at that time.

Q. So your testimony refers to the income tax returns? A. The income tax returns only.

Q. If you felt that there was danger of Mrs. Newman contending that the trust was a revocable trust, will you state how it happened that Mrs. Newman testified in the Superior Court proceeding that the trust was irrevocable?

A. Mrs. Newman is a very truthful woman, and she testified to the truth in court. I wasn't particularly concerned right at that moment, but it was for the future.

I knew that she was spending her money, the income, as well as selling securities that had been

(Testimony of Clarissa Shortall.)

turned over to her, and I was afraid that some time in the future she might find herself in bad financial straits. In fact, she did. By the end of 1947, [57] she did come to me and ask for a loan for necessary living expenses until the next brewery dividend was paid.

Q. Her money had gone in gambling?

A. To the best of my knowledge—or dissipating it some way.

Q. I show the Notice of Deficiency, which is Exhibit A to the petition and to the amended petition in this case, and call to your attention that on page 2 it is stated in the notice of deficiency that on or about May 2, 1946, there was distributed to Clarissa Shortall, as guardian of the estate of Lois E. Senderman, a minor, certain properties. Then there is an itemization of those properties, beginning with Cash, $24,577.39, and going down through 8 per cent interest as limited partner of Aztec Brewing Company, a limited partnership, $175,000.

Now, so that the record may be clear, I am not reading the last item in that list at the moment, pertaining to an alleged over-payment of income tax and accrued interest; but calling your attention to the items beginning with Cash, and going through that 8 per cent limited partnership interest; and also calling your attention, incidentally, to the fact that Paragraph XXII of the stipulation of facts states that the value of that 8 per cent interest in 1946 was $151,051.09, and not $175,000,

(Testimony of Clarissa Shortall.)

as stated on Page 2 of the 90-day letter; and I ask you to examine all of those items, beginning with [58] Cash and going through the 8 per cent interest, and after your examination I ask you to state whether all of those items had their source in the transfer of 800 shares of Aztec Brewing Company stock in trust for Lois E. Senderman, Petitioner's daughter, in 1943?

A. Yes, everything in this list was purchased with the proceeds of the original 800 shares of stock in the Aztec Brewing Company, the income from which was transferred to the trust.

Q. Or the partnership earnings, into which it is stipulated the stock was converted?

A. Yes.

Q. Now, I call your attention to the last item on page 2 of the Notice of Deficiency, Exhibit A to the petition in this case——

A. This is the page I am looking at right here.

Q. Now, that item is designated, "Overpayment of Income Tax and Accrued Interest for the Years 1943 to 1945, $64,035.05." I ask you whether that item was distributed to you on or about May 2, 1946.

A. No, I never considered that there was an overpayment.

Q. When I say "distributed to you", I mean distributed to you as guardian.

A. No, never was. [59]

Q. Has it ever been distributed to you?

A. No.

Q. Will you state if you were aware on May

(Testimony of Clarissa Shortall.)

2, 1946, that there might be a contention made by the Government that there were over assessments in income tax due to the trust?

A. No, I wasn't aware. I never thought there was an overpayment made.

Q. When did you first become aware that there would be such a contention.

A. After the Revenue Agent started to examine the various returns and made the contention that the trust was revocable. That was in 1947. I believe it was 1947, the first part of 1947 sometime.

Q. But in any event, well after May 2, 1946?

A. Oh, yes.

Q. Now, so that the record may be clear, let me ask you this question: Paragraph XX of the stipulation of facts states that by means of letters of the type commonly known as 30-day letters, addressed to the trust and to the minor, both of which are dated August 25, 1949, the Internal Revenue Agent in charge of the San Francisco Division proposed over assessment of income tax in favor of the trust and of the minor, as follows—and then the over assessments are listed for 1943, '44, and '45, and they aggregate $62,763.47. [60]

Now, the item set forth as the last item on page 2 of the Notice of Deficiency, which refers to the alleged overpayment of income tax and of an alleged interest thereon come to $64,035.05. Will you state, if you know, whether the difference between $62,763.47 and $64,035.05 is alleged accrued interest on the overpayment?

(Testimony of Clarissa Shortall.)

A. Yes, that was the accrued interest.

Q. Paragraph XXI of the stipulation of facts states that by means of a Notice of Deficiency dated January 23, 1951, the Commissioner has determined deficiencies in income tax against the Petitioner—that is, Mrs. Newman—for the calendar years 1943 to 1947. It then sets forth those alleged deficiencies. And it is further stipulated that these deficiencies are based mainly, and that the over assessments in favor of the trust and of the minor, to which you have just testified, are based wholly upon including in Petitioner's income all of the income reported by the trust and by the minor during the calendar years 1943 to 1947, inclusive, except that the deficiency for 1944 is based upon an addition to the Petitioner's income of approximately $78,000, of which approximately $20,000 represents income reported by the minor.

The Court: To what are you addressing these questions, to what phase of the case?

Mr. Taylor: These questions, your Honor,—and this is about my last question, I have just one more—pertain to [61] the question, which it is difficult to understand without examining the stipulation, as to whether or not, assuming there was some sort of gift in 1946, the gift included the $64,000 alleged overpayment in income tax. That is the purpose. It is to clarify what has been stipudated.

The Court: Very well.

Q. (By Mr. Taylor): Now, you have in mind

(Testimony of Clarissa Shortall.)

the question as I have asked it to you up to now?

A. Yes, Mr. Taylor.

Q. Then I want to ask you to state if the Petitioner should lose the income tax case, and you as guardian should receive the alleged over assessments in income tax plus interest thereon, would you keep those alleged over assessments and interests thereon?

Mr. Boyle: That, your Honor, of course, is a legal conclusion.

The Court: What difference does that make?

Mr. Taylor: It has a direct bearing on whether or not there was a gift of the alleged over assessments in 1946.

The Court: Not what she would do with these overpayments, if they were made.

Mr. Taylor: I think, your Honor, it has a bearing on whether or not there was a gift of this item of $64,000 plus in 1946. [62]

Mr. Boyle: Your Honor, that would be a legal conclusion. She stands as guardian. What she does or does not do is something which, under the law, must be decided.

Mr. Taylor: I may state, your Honor, that it is difficult to see the purport of this question without studying the stipulation, because most of these facts on this point have been stipulated.

The Court: Proceed. I don't see the relevancy.

The Witness: Do you want me to answer the question now?

Mr. Taylor: Please.

(Testimony of Clarissa Shortall.)

The Witness: No, I don't think they were ever an asset of the guardianship estate. If by any chance the overpayments were to be made, I would immediately request authority from the Superior Court of this City and County to turn them over to Mrs. Newman. I don't think they ever belonged to the guardianship estate.

Q. (By Mr. Taylor): Paragraph VII of the stipulation of facts states that the Petitioner filed a State of California gift tax return for the calendar year 1943——

Mr. Boyle: If your Honor please, just so the record will show, the Respondent has objected to the introduction of Paragraphs VII and VIII of the stipulation of facts, and that is what counsel for the Petitioner is reading from now. [63]

The Court: Proceed.

Mr. Taylor: I will repeat.

Q. (By Mr. Taylor): Petitioner filed a State of California gift tax return for the calendar year 1943, in which the Petitioner reported a transfer of 800 shares of Aztec Brewing Company stock to her daughter. Said return was filed with the Comptroller of the State of California on or about April 15, 1944.

That is what Paragraph VII of the stipulation of facts states.

Now, will you state, if you know, whether a copy of the trust, Exhibit 2-B to the stipulation of facts, was attached to that State of California

(Testimony of Clarissa Shortall.)

gift tax return for 1943? A. Yes, it was.

Mr. Taylor: Your witness, Mr. Boyle.

Cross Examination

Q. (By Mr. Boyle): Miss Shortall, you have testified that you helped prepare the trust instrument in 1943? A. Yes.

Q. And you have testified that you were familiar with the contents of Paragraphs II, III and V? A. Yes.

Q. Will you relate the contents of Paragraph II of that trust? [64] A. Paragraph II——

Mr. Taylor: Do you want her to do it from memory, Mr. Boyle?

Mr. Boyle: Yes, from memory.

A. Well, I believe Paragraph II is the one which stated that Mr. Goldman will hold the property for the benefit of the minor, and upon the termination of the trust will turn the property over to Lois E. Senderman, the minor.

Q. Is that all?

A. Oh, there are probably other things in it, Mr. Boyle. I haven't memorized it.

The Court: Just a minute. That is a rather unfair question, calling for her to remember details of the paragraph.

Q. (By Mr. Boyle): Are you aware of the fact that the fact that the minute book of the probate clerk and the reporter's records show that the hearing of July 10, 1947 only two people were present—that is, Mrs. Newman and yourself?

(Testimony of Clarissa Shortall.)

A. No, I am not aware of that.

Mr. Taylor: I object. I move to strike the question and answer, your Honor. No proper foundation has been laid. It is incompetent, irrelevant and immaterial, and hearsay.

The Court: Motion is granted. [65]

Q. (By Mr. Boyle): I have in my hand here Exhibit 4-D, entitled "Petition for Appointment of Successor Trustee or Trustees in Place of Deceased Trustee," which you have signed as attorney for the Petitioner; also Exhibit 6-F, entitled "Petition for Appointment of Guardian of Minor;" and also Exhibit 9-I entitled "Petition by Guardian for Instructions"; in which no mention was made of the existence of an oral trust. Is there any reason why that was omitted from those petitions with the Court?

A. No reason that I know of.

Q. Now, Exhibit 4-D, which was filed April 5, 1945, Exhibit 6-F, filed May 2, 1946, and Exhibit 9-I, filed April 22, 1947, while containing no reference to an oral trust, are different from Exhibit 10-J, which was filed June 23, 1947—and Exhibit 10-J was signed by you, and is entitled "Amended Petition by Guardian for Instructions."

Now, can you state why this last amended petition for instructions by you for the first time brought out the existence of the oral trust?

A. I realized that the first petition, 9-J, I believe it is, didn't really conform to the facts as they were, and that it should be corrected. I dis-

(Testimony of Clarissa Shortall.)

cussed it with Mr. Taylor, and we corrected it by way of an amended petition.

Q. Were you aware when you filed the previous petitions that the oral trust was in existence?

A. Yes, I was already aware of it. [66]

Q. When you stated in those petitions merely that there had been a written declaration dated January 1, did you not feel maybe you were omitting something?

A. No, I didn't feel that.

Mr. Taylor: Would you please repeat the answer?

The Witness: No, I thought they were sufficient as they stood for the purpose for which they were filed.

Q. (By Mr. Boyle): When was Mr. Taylor first retained by you as attorney on these matters?

Mr. Taylor: I object to the question. That is too vague.

The Court: I think it is sufficiently explicit. She may answer.

A. After Mr. Goldman's death—he died on March 1, as I have already testified—the income tax returns for 1945 had not been prepared or filed, and I was obviously going to take care of Mrs. Newman's and her daughter's legal affairs from the time of Mr. Goldman's death, and I didn't want to assume the full responsibility for the taxes. I didn't feel that my knowledge was sufficient. So I would say it was sometime towards the end of March 1946, that I first spoke to Mr.

(Testimony of Clarissa Shortall.)

Taylor. I was then in the same building that his office was in, and I had known him from other matters, when we discussed it for the first time.

Later on, within the next few weeks, I spoke to Mrs. Newman and asked her if she wanted Mr. Taylor to handle tax matters for her, and she met him and said, yes, she did.

That is as close as I can remember it. I don't know that that would pertain to these particular matters, but that is the first time that Mr. Taylor was employed or had anything to do with either the Newman or Senderman affairs.

Q. Did the fact that you mentioned for the first time in June 1947 that there was such a thing as an oral trust, have anything to do with the tax liabilities in this case?

Mr. Taylor: I object. No, I will not object. You can answer.

A. No, I stated what my motives were for bringing the petition. There were two reasons. One was that I wanted it clarified for the tax revenue agent who was examining the returns, and I wanted clarification on account of Mrs. Newman, as I have already testified. And I didn't feel that the first petition was really accurate and covered all of the facts. I wanted it to show that there was an oral trust right from the start.

Q. Did the fact that the Krag Decision came down in the meantime, between April and June, have anything to do with inserting the provision as to the oral trust?

(Testimony of Clarissa Shortall.)

Mr. Taylor: I object to the question. It is immaterial, incompetent and irrelevant; no proper foundation laid. [68]

The Court: What is the Krag Case?

Mr. Boyle: That is a very similar case to this, your Honor. It was tried here, and involves people in Marin County.

It is a decision of the Tax Court in 8 TC 1091, in which case the husband and wife had made a deed of stock to a daughter, filed a gift tax return, and later they found out that the lawyer had been mistaken and it was not irrevocable, but revocable, and he attempted to make it irrevocable for the first time.

The Court: That is sufficient.

Mr. Boyle: And in doing so——

The Court: That is sufficient. No foundation has been laid to show that she knows anything about the Krag case.

Mr. Boyle: Well, my question could be answered yes or no, then, couldn't it, your Honor?

The Court: If you wish to pursue this, ask whether she is familiar with it.

Mr. Boyle: I will drop it, your Honor.

Q. (By Mr. Boyle): You stated in the petition filed for instructions on April 22, 1947, that in reducing the alleged oral trust to writing, through inadvertence and error no provision was made as to irrevocability. [69]

M. Taylor: Would you please identify the ex-

(Testimony of Clarissa Shortall.)

hibit number so that the record won't be confused?

Mr. Boyle: Exhibit 9-I.

Q. (By Mr. Boyle): Did you feel at that time that an error had been made in reducing the oral trust to writing, by the omission of a specific provision as to irrevocability?

A. What I meant by that was that the word "irrevocable" had not been used in the trust declaration.

Q. Did you feel that the omission of that word might make the trust revocable?

A. No. I at all times felt that the trust was irrevocable.

Q. Did you feel that an error had been made?

A. Well, after all, at that time the Revenue Agent had said that it was an error. I never felt that it was an error, but as I told you, I wanted to correct this for all purposes, and the Revenue Agent said that that particular word had to be on the face of the document. Then I thought it was a mistake that it wasn't.

My own interpretation of the document, as well as Mr. Goldman's, was that on its face it was irrevocable because of the provisions of it.

Q. You have testified that at the hearing held July 10, 1947, the order pursuant to which is marked Exhibit 11-K, Mrs. [70] Newman testified to the effect that the trust was considered irrevocable; is that correct? A. Yes.

Q. Was June 1947 the first time that the oral trust, or the possible existence of the oral trust

(Testimony of Clarissa Shortall.)

was ever mentioned in any documents in this case?

A. To the best of my knowledge, it probably is. I can't answer exactly, Mr. Boyle. I am pretty sure it is, but there may be something before that where it was mentioned.

Mr. Boyle: That is all, your Honor.

The Court: Have you any other questions, Mr. Taylor?

Mr. Taylor: I just have a few, your Honor, to clarify a few things.

Redirect Examination

Q. (By Mr. Taylor): Miss Shortall, so that the record may be clear, I show you Respondent's Exhibit N, being the income tax return for Lois J. Newman for the calendar year 1945, and ask you to state for the record from the return who prepared that return.

A. That was Mr. Frank H. Baker, who was a Certified Public Accountant, who handled the Newman-Senderman accounts for Mr. Goldman—the bookkeeping end of it.

Q. So that you did not mean to testify that I prepared the 1945 return? [71]

A. Oh, no, Mr. Taylor. You weren't consulted until after those were filed. They were what made me worry about taxes, and I wanted a tax expert to handle it.

Mr. Goldman had examined them in previous years, and I didn't feel that I was competent to

(Testimony of Clarissa Shortall.)

do it, and I wanted somebody who knew about taxes to handle those matters.

Q. You consulted me about Mrs. Newman's tax situation, but you did not request me to prepare her 1945 return?

A. No, they were already prepared before I consulted you. It must have been the end of March or the first of April when I first talked to you. I am not sure. It may have been the end of April.

Q. Do you recall whether you first thought of me because Mrs. Newman objected to Mr. Bianchi having anything to do with her affairs?

A. Yes.

Mr. Boyle: Respondent objects to the question as leading.

The Court: The question is leading, but no harm is done by it.

Proceed, have you any other questions?

Mr. Taylor: Yes, just one more.

Q. (By Mr. Taylor): Mrs. Newman testified that she wasn't sure whether you were present or not at the conference with Mr. Goldman at [72] which the oral trust was created. A. Yes.

Q. You were present?

A. Oh, yes, I was present.

Mr. Taylor: That is all.

Mr. Boyle: No more questions, your Honor.

The Court: You are excused.

(Witness excused.)

The Court: Have you any other witnesses?

Mr. Taylor: That is all. Petitioner rests, your Honor.

Mr. Boyle: If your Honor please, the Respondent is not certain as to the legal approach that is going to be made by Petitioner, and therefore request is made that alternative briefs be allowed, in order that the issues may meet and that we may speak upon the same plane of discourse.

The Court: How much time do you need for an opening brief, Mr. Taylor?

Mr. Taylor: Your Honor, we would like, if possible, two months, but we have no objection to alternative briefs.

The Court: Very well, sixty days for Petitioner's brief; forty-five for Respondent to reply, and thirty for Petitioner to reply.

There being nothing further to come to the Court's attention, we will recess until Monday morning, 9:30 o'clock. [73]

(Whereupon, at 4:50 p.m., the hearing in the above entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed Nov. 20, 1951.

[Title of Tax Court and Cause.]

STIPULATION REGARDING CORRECTIONS TO TRANSCRIPT

It is hereby stipulated by and between the parties hereto, through their respective counsel, that

the following corrections should be made to the Transcript of the proceedings before this Court:

1. The word "guardians" on line 16 of page 3 should be "guardian".

2. The second full paragraph on page 8 should read as follows:

"Finally, we contend that if this Court should determine that there was a transfer of property by gift or for less than an adequate and full consideration in money or money's worth during 1946, then such transfer was effected by a Court decree, and such transfer, under the doctrine of the United States Supreme Court in Harris vs. Commissioner 340 U.S. 106, was not subject to gift tax."

3. The word "trustor" on line 12 of page 10 should be "trustee."

4. Line 13 on page 10 should read as follows: "if this Court holds that the gift was made in 1946, those taxes".

5. Line 15, of page 10 should read as follows: "corpus in 1946 if they had not been erroneously paid; and also"

6. The word "gone" in line 1 on page 16 should be "done."

7. The word "estate" on line 13 of page 25 should be "or State."

8. The word "attempted" on line 15 of page 31 should be "attended."

9. The figures "1944" on line 22 of page 37 should be "1943."

10. The word "secret" on line 19 of page 56 should be "secondary."

11. The word "Craig" on line 21 of page 68 and on lines 1 and 15 of page 69 should be "Krag."

Dated: San Francisco, California, December 20, 1951.

/s/ SAMUEL TAYLOR,
/s/ WALTER G. SCHWARTZ,
Counsel for Petitioner.

/s/ MASON B. LANSING,
Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Dec. 26, 1951.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States do hereby certify that the foregoing documents, 1 to 20, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designations as to Contents of Record on Review" in the proceeding before The Tax Court of the United States entitled "Lois J. Newman, (Formerly Lois J. Senderman), Petitioner, vs. Commissioner of Internal Revenue, Respondent, Docket No. 29650" and in which the petitioner and respondent in The Tax Court proceeding have initiated appeals as above numbered and entitled, together with a true

copy of the docket entries in said Tax Court proceeding, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 20th day of October, 1953.

[Seal]: /s/ VICTOR S. MERSCH,

Clerk, The Tax Court
of the United States.

[Endorsed]: No. 14112. United States Court of Appeals for the Ninth Circuit. Lois J. Newman (formerly Lois J. Senderman), Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed November 2, 1943.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 14112

LOIS J. NEWMAN, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STATEMENT OF POINTS

Comes now Lois J. Newman, petitioner on review in the above-entitled cause, by her attorneys Gang, Kopp & Tyre by Martin Gang and Norman R. Tyre, and Irell & Manella by Louis M. Brown, and hereby states that she intends to rely upon the following points in this proceeding. The petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

(1) The ruling that the completed gift did not occur in 1943 is contrary to the evidence.

(2) The ruling that the completed gift occurred in 1946 is contrary to the evidence.

(3) With no conflicting evidence, finding facts contrary to the evidence presented.

(4) Disregarding the order of the Superior Court in and for the County of San Francisco, California.

(5) Failing to recognize the substance, rather than the form, of a transaction.

(6) The finding of deficiency of gift tax for the year 1946.

(7) The finding that Richard S. Goldman declared himself trustee.

(8) Failing to find taxpayer on January 1, 1943 declared Richard S. Goldman Trustee of irrevocable trust.

(9) Failing to find that taxpayer had no donative intent in 1946.

(10) Holding that the trust became irrevocable upon appointment of guardian.

GANG, KOPP & TYRE and
IRELL & MANELLA
/s/ By LOUIS M. BROWN,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 2, 1953. Paul P. O'Brien, Clerk.

[Title of U.S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON REVIEW

To the Clerk of the United States Court of Appeals for the Ninth Circuit:

The petitioner hereby designates the following documents and records in the above-entitled cause:

(1) The docket entries of all proceedings before the Tax Court.

(2) Pleadings before the Tax Court, as follows: (a) Petition; (b) Answer; (c) Amended Petition filed November 2, 1951; (d) Answer to Amended Petition filed November 2, 1951.

(3) Stipulation of facts filed November 2, 1951.

(4) The findings of fact and opinion of the Tax Court.

(5) The decision of the Tax Court.

(6) The petition of Newman for review.

(7) The entire official transcript of oral testimony.

(8) Stipulation regarding corrections to transcript filed December 26, 1951.

(9) Exhibits 1-A through and including 12-L, and petitioner's Exhibits 13 and 14.

(10) This designation of contents of record on review.

(11) Statement of Points.

GANG, KOPP & TYRE and
IRELL & MANELLA
/s/ By LOUIS M. BROWN,
Attorneys for Petitioner.

[Endorsed]: Filed Dec. 2, 1953. Paul P. O'Brien, Clerk.

No. 14112

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOIS J. NEWMAN (formerly Lois J. Senderman),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONER'S OPENING BRIEF.

IRELL & MANELLA,
GANG, KOPP & TYRE,
MARTIN GANG,
LOUIS M. BROWN,
MILTON A. RUDIN,
LAWRENCE E. SILVERTON,
6400 Sunset Boulevard,
Los Angeles 28, California,
Attorneys for Petitioner.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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TABLE OF AUTHORITIES CITED

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No. 14112

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Lois J. Newman (formerly Lois J. Senderman),

Petitioner,

vs.

Commissioner of Internal Revenue,

Respondent.

PETITIONER'S OPENING BRIEF.

Nature of the Controversy.

The controversy involves the determination of the year in which petitioner made a gift. The petitioner made a gift in trust to her daughter in 1943. She filed Federal and State gift tax returns. The value of the gift was reported in the Federal return as $30,000.00 with no gift tax payable thereon. The petitioner asserts that a completed gift occurred in 1943.

Respondent asserts that the completed gift occurred in 1946 when the same property was valued at $151,051.09. The gift in 1943 was made to a trustee who died in 1946. Upon his death in 1946, the corpus of the trust was distributed to the duly appointed guardian of the beneficiary and by reason thereof, respondent asserts that the com-

pleted gift occurred in 1946. This assertion is made, although there is nothing in the record to establish any act by petitioner in 1946 to make or complete a gift; nor is there anything shown to establish that in 1946 the petitioner could have prevented distribution of the trust to the guardian of the beneficiary.

The Tax Court determined a gift tax deficiency of $50,079.84 for 1946. Awaiting the determination of this appeal is a controversy involving a proposed overassessment of income taxes in the sum of $62,763.47 paid to the minor and the minor's trust in 1943, 1944 and 1945, and income tax deficiencies against petitioner in the sum of $244,384.39 for the years 1943 to 1947, inclusive. Said deficiencies are based mainly, and said overassessments are based wholly, upon including in petitioner's income all of the income reported by said trust and by said minor during said calendar years. [R. 32-34.]

There seems to be no question that petitioner intended to create an oral irrevocable trust in 1943. Subsequently, the trustee, her attorney, prepared and executed a written instrument acknowledging that he was holding the trust estate, but he failed to use the magic word "irrevocable" and by reason of this failure, respondent claims petitioner must now pay almost $300,000.00 in taxes for making a $30,000.00 gift in 1943.

Pleadings and Jurisdictional Facts.

On July 24, 1950, the above-named petitioner filed her Petition in the Tax Court of the United States for redetermination of a deficiency for gift taxes for the calendar year 1946 in the amount of $71,195.99. Petitioner alleged that she established an irrevocable oral trust for the benefit of her daughter in 1943 and the Commissioner

erred in determining that petitioner made a gift or gifts during the calendar year 1946. [R. 5-14.]

An Answer was filed in the Tax Court on September 19, 1950. [R. 15-17.] Thereafter, an Amended Petition [R. 17-23] and Answer to Amended Petition [R. 23-25] were filed.

A Stipulation of Facts was filed in the Tax Court on November 2, 1951 [R. 26-92], on which day the hearing was held before the Tax Court sitting in San Francisco, California. [R. 115-190.]

Following the promulgation of Findings of Fact and Opinion [R. 93-111], the Tax Court entered its Decision on May 15, 1953, that there is a deficiency of $50,079.84 in gift tax for the year 1946. [R. 111-112.]

Petition for Review by this Court of said Decision was filed August 10, 1953. [R. 112-114.] Said Petition was docketed on November 2, 1953 [R. 191], and the Statement of Points [R. 192-193] and Designation of Contents of Record on Review [R. 193-194] were filed December 2, 1953.

This Court has jurisdiction pursuant to Section 1141(a) of the Internal Revenue Code. (26 U. S. Code, Sec. 1141(a).)

Statement of the Case.

Petitioner has a daughter named Lois E. Senderman, born May 14, 1935. Said daughter was the issue of petitioner's marriage to Aaron Senderman, which marriage ended by divorce in 1940. At all times material hereto prior to December, 1944, petitioner's name was Lois J. Senderman; in December, 1944, she married Louis Newman and since then her name has been Lois J. Newman. [R. 26.]

The Oral Trust.

Prior to January 1, 1943, petitioner owned 2396⅞ shares of stock of Aztec Brewing Company, a California corporation, which stock she had acquired by inheritance from her parents. [R. 26, 129.] On or about January 1, 1943, petitioner conveyed 800 shares of said stock to her attorney, Richard S. Goldman, as trustee, to be held by him for her daughter, Lois E. Senderman. [R. 27, 125-128, 158-160.]

The record contains the uncontradicted testimony of petitioner and Clarissa Shortall, an attorney who was associated with Mr. Goldman, that on or about January 1, 1943, petitioner created an *oral irrevocable trust* of said 800 shares; Mr. Goldman being the trustee and petitioner's daughter the beneficiary. [R. 125-128, 158-160.] Respondent has stipulated that Mr. Goldman became trustee of said 800 shares in trust for petitioner's daughter in 1943, but contends that the trust was revocable and therefore the gift was not completed until 1946.

We submit that all of the facts clearly indicate that an oral irrevocable trust was created in 1943.

Petitioner testified that in several periods of her life she had "quite a bit of money" which she dissipated; that when her father was alive she "leaned very heavily" upon him; when her father died he left debts and the stock of the Aztec Brewing Company which was practically worthless at the time of his death. [R. 125.] She had been married to a man who was financially irresponsible and she and her former husband had dissipated a great deal of money. [R. 126.]

As the stock increased in value, petitioner realized that with the death of her parents that "this was the last

money" she might have and she wanted to provide for her daughter. She spoke to Mr. Goldman about this wish to provide for her daughter. [R. 126.]

They discussed 800 shares as they thought it would be valued at $30,000.00. [R. 126.] The mere fact of the mention of the specific exemption amount of $30,000.00 is clear evidence petitioner and her attorney were talking about making a completed gift in 1943 which would not incur any gift tax liability. Petitioner testified in a frank manner as to this gift, the reasons for the gift and the amount.[1]

Mr. Goldman told her that once she created the trust, no matter what she did or what happened to her, the money would be out of her reach forever.[2] With this admonition, petitioner was still willing to provide for her daughter but Mr. Goldman wanted her to think it over.

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[1]Petitioner testified:

"At the time I had this stock, but actually very little money, and we came to the conclusion that I could give her about 800 shares of the brewery stock—the value was about $30,000—and that I would incur no cash outlay or no further responsibility—I mean to pay any more money.

"I did this because I wanted to feel that if I was foolish, or remarried, that the child would be provided for. I wanted to see that she would attain maturity and have enough to be educated and have a little money to go on. I didn't think at that time—I don't think anybody did—that the stock would become as valuable as it did. I don't think anybody foresaw that. If I had known that I wouldn't have been so anxious to provide for her future, but I wanted to see that she did have something." [R. 126-127.]

[2]"He continued to impress upon me the fact: 'Remember, once this is done, no matter what happens, no matter if you need the money or not, you will not be able to touch this money.'

"I told him yes, I wanted the trust made.

"He said, 'I want you to think about it. Think it over very carefully.'" [R. 127.]

In January, 1943, petitioner told Mr. Goldman she thought it over and "wanted the trust made for her daughter." She told him: "I didn't want anybody able to touch the child's money, myself included—particularly myself, I guess." [R. 128.]

Mr. Goldman said the "trust stands of today. From today on I will be the trustee." [R. 128.] Mr. Goldman told her he was busy then but he would have the documents drawn up.

Petitioner's testimony was corroborated by Clarissa Shortall, a member of the State Bar of California since 1935. [R. 158-160.][3] Yet the Tax Court chose to ignore this oral irrevocable trust by reason of Mr. Goldman's preparation and execution of a written instrument which we shall next discuss.

The Opinion of the Tax Court recognized that both Mr. Goldman and Miss Shortall understood that petitioner wanted an irrevocable trust, *but solely because the subsequent written instrument did not use the word "irrevocable" the Tax Court held there was no completed gift in 1943.*

Laymen have long accused the legal profession of twisting true intents and cleverly using a word or two to accomplish a result not intended and inequitable. Most lawyers quickly assure their clients and lay friends that there are no mysterious devices or secret "hocus pocus" tricks used by the legal profession, but it is just that we have rules of law governing our conduct and affairs, which rules are logically and equitably administered to accomplish justice. We submit that it would take great

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[3]Miss Shortall was associated with Mr. Goldman in 1943.

persuasion to convince laymen (and lawyers) that our laws are fair and enforced justly and equitably should they learn that a lawyer's failure to insert one word in a document, *the lawyer prepared and signed,* cost his client over one-quarter of a million dollars.[4]

The Written Instrument.

Some months after the creation of said oral irrevocable trust, Mr. Goldman prepared and executed a written instrument which was pre-dated to January 1, 1943. [Stipulation of Facts, Ex. 2-B; R. 38-41.]

Miss Shortall testified that Mr. Goldman was a busy lawyer (probably overworked as most lawyers) and a man who had been in practice in San Francisco since about 1913. [R. 161-162.] In 1946, Mr. Goldman committed suicide. [R. 28, 125.] Under such circumstances we hesitate to comment unfavorably as to a deceased lawyer's draftsmanship, but we submit that this instrument which respondent contends made an oral irrevocable trust revocable is not a model of drafstmanship. The written instrument does not contain any declaration of

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[4]The Commissioner's position is that a completed gift was not made until 1946, when the interest in the Aztec Brewery Company had increased from $30,000.00 in 1943 to $151,051.09 in 1946, resulting in the deficiency gift tax of $50,079.84. However, the Commissioner asserts in a proceeding in the Tax Court still pending that if the gift was not completed until 1946, the income tax paid on behalf of the minor is to be returned and, accordingly, has determined deficiencies in petitioner's income taxes in excess of $200,000.00. The Commissioner determined a further gift tax deficiency based on the contention that the proposed overassessment of income taxes to the trust was a further gift by petitioner. The Tax Court held that since the income tax liability question is not settled, "we have no alternative to holding as error, the inclusion of the controverted and contingent amount within the gift consummated May 2, 1946." [R. 111; also see R. 32-34, 99-101, 109-111.]

trust by a trustor; in fact, it was more of a deposit receipt by Mr. Goldman for certain property held by him for petitioner *and for petitioner's minor daughter.*

In said written instrument, Richard S. Goldman acknowledged that he had in his possession 3 certificates of the capital stock of Aztec Brewing Company, certificate No. 12 for 2394⅞ shares standing in the name of Richard S. Goldman, trustee for Lois Senderman, certificate No. 13 for 1 share standing in the name of Phillip Storer Thacher and certificate No. 18 for 1 share standing in the name of Lois J. Senderman; that he held all of the certificates as Trustee and that the beneficial owners of the stock were Lois J. Senderman, owner of 1596⅞ shares, and Lois E. Senderman, a minor, the daughter of Lois J. Senderman, owner of 800 shares. The document further went on to set forth certain agreements by the Trustee with reference to the 800 shares and any other property which the *said minor daughter might thereafter deposit with him.* He agreed in subdivision (2) that he would deliver the property to any duly appointed guardian of the minor; if no guardian was appointed, to deliver the property to the child upon her attaining the age of 21 years. Amongst other agreements in subdivision 3 the Trustee provided for his resignation, discharge or death, in which event the property was to be transferred into the name of the duly appointed guardian of said minor. This document was in the form of a recital of facts by "The undersigned, Richard S. Goldman." [R. 38.]

Although this document doesn't contain the word "irrevocable," it should be kept in mind that it was not a formal declaration of trust by petitioner. Moreover, the written instrument clearly treats the 800 shares as a

completed gift and the property of the minor, Lois E. Senderman.

We think it important to stress that Mr. Goldman agreed to hold the 800 shares of stock "and any other property, real or personal, *which said Lois E. Senderman* (the minor) *may hereafter deposit with him.*" [R. 38; emphasis supplied.] Petitioner did not sign as "Trustor." Petitioner signed the instrument "individually" and as "Mother and Guardian of Lois E. Senderman, a minor." Her signature was under a separate paragraph below Mr. Goldman's signature and in which paragraph she acknowledged receipt of a copy of the instrument and she agreed that she and her daughter would be bound thereby.

The Gift Tax Returns.

Petitioner filed Federal and State of California gift tax returns for the calendar year 1943 in which she reported a gift to her daughter of said 800 shares of stock. [R. 27, 35.] The value of the gift was reported in the Federal return as $30,000.00, with no gift tax payable thereon. [R. 35.]

The $30,000.00 valuation was also placed upon the 800 shares in the State of California gift tax return. The State of California inquired as to the facts on which said valuation was based and determined a deficiency in petitioner's 1943 State of California gift tax, which deficiency was paid by petitioner. [R. 27-28.]

The Probate Court Proceedings.

On April 5, 1946, in a proceeding designated "In the Matter of the Irrevocable Trust of Lois E. Senderman, Beneficiary, and Lois J. Senderman, Donor and Trustor, and Richard S. Goldman, Trustee," a petition was filed by

the executor of the Estate of Richard S. Goldman with the Superior Court of the State of California in and for the City and County of San Francisco (hereinafter referred to as the Probate Court) for the appointment of a successor trustee or trustees in place of the deceased trustee. [R. 28-29, 56-59.]

On April 5, 1946, the Probate Court issued its order appointing Clarissa Shortall as successor trustee in place of the deceased trustee. [R. 29, 60.]

On May 2, 1946, a petition was filed in the Probate Court by the executor of the estate of said Richard S. Goldman for the appointment of a guardian of the Estate of said Lois E. Senderman. [R. 29, 61-65.]

On May 2, 1946, the Probate Court issued its order appointing Clarissa Shortall as guardian of the Estate of said Lois E. Senderman. [R. 29, 65-73.] It is this order by the Probate Court whereby the assets held for the minor were transferred to the minor's duly appointed guardian which respondent contends created the taxable event in 1946.

In April and in June, 1947, the said guardian filed a petition and amended petition, respectively, for instructions.[5] [R. 29-30, 74-82.] Notice of the hearing was duly given to the petitioner herein; to the minor's father,

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[5]Respondent and the Tax Court attach great importance to the fact that the Petition for Instructions was not filed until after the revenue agent raised the question of revocability and possible tax consequences. [R. 107.] Miss Shortall testified that when the revenue agent raised the question of revocability, she was afraid that Mrs. Newman might be glad to accede to that position and try to get the property back and the petition was filed to protect the minor's assets. She pointed out that although Mrs. Newman received $320,000.00 in distribution of Aztec Brewery profits from May, 1946, to June, 1947, she had requested an allowance from the guardianship estate to support her daughter on the

Aaron Senderman; to the Commissioner of Internal Revenue, Washington, D. C.; to the Secretary of the Treasury, Washington, D. C.; to the Internal Revenue Agent in Charge, San Francisco, California; and to the Collector of Internal Revenue, San Francisco, California. The petitioner and the guardian appeared in person, each with an attorney. Oral and documentary evidence was introduced and the issue was argued by counsel. The Court, having considered the evidence and arguments, found that Lois J. Newman created an irrevocable oral trust of 800 shares of stock. The Court further found that 6 or 7 months later the trustee executed a written declaration of trust which, while it failed to expressly state that it was irrevocable, did not terminate the oral trust but said oral trust continued in full force and effect until terminated. [R. 83-88.]

Specification of Errors.

Petitioner assigns as error the following acts and omissions of the Tax Court of the United States:

(1) The ruling that the completed gift did not occur in 1943 is contrary to the evidence.

(2) The ruling that the completed gift occurred in 1946 is contrary to the evidence.

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ground that she was not financially able to take care of her daughter. [R. 171-172.]

Miss Shortall testified:

> "For that reason, and because of other knowledge that I had, I realized that Mrs. Newman was spending a great deal of money. I knew that Mrs. Newman gambled. And I was rather concerned that she might find herself in a position where, because of the suggestion that was put in her mind by the Internal Revenue Agent that the trust could be revoked, she might be tempted to revoke the trust, and get some of the money back." [R. 172.]

(3) With no conflicting evidence, finding facts contrary to the evidence presented.

(4) Disregarding the order of the Superior Court in and for the County of San Francisco, California.

(5) Failing to recognize the substance, rather than the form, of a transaction.

(6) The finding of deficiency of gift tax for the year 1946.

(7) Failing to find taxpayer on January 1, 1943, declared Richard S. Goldman Trustee of irrevocable trust.

(8) Failing to find that taxpayer had no donative intent in 1946.

(9) Holding that the trust became irrevocable upon appointment of guardian.

Summary of the Argument.

1. The valid decree of the California Probate Code construing the oral trust as irrevocable was binding upon the Tax Court.

2. Petitioner could not have prevented the distribution to the guardian on May 2, 1946, or the making of the Order holding the oral trust irrevocable.

3. Petitioner made a completed oral gift in 1943.

4. It was error for the Tax Court to disregard the oral irrevocable trust and determine the controversy on the basis of the written instrument.

5. The written instrument did not create a revocable trust.

6. The transfer of the assets to the guardian in 1946 did not constitute a taxable gift.

ARGUMENT.

I.

The Valid Decree of the California Probate Court Construing the Oral Trust as Irrevocable Was Binding Upon the Tax Court.

California law determines whether the trust is revocable or irrevocable. (*Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308 (1934).) The Tax Court is bound to follow California law.

The best authority on the California law applicable to the controversy presented herein is the California Probate Court Order which held that the oral trust was irrevocable. [R. 83-88.]

In 1947, the California Probate Court had before it the direct issue as to whether or not an oral irrevocable trust was created in 1943. The Court held that an oral irrevocable trust was created in 1943; the Court further stated in its Order that the Court fully considered the evidence and the arguments of the parties.

The Tax Court refused to follow the California court's decision, stating as its reason:

> "There was no controversy between the parties and no independent judgment was rendered." [R. 104.]

This statement of the rule of recognition is erroneous as will be demonstrated herein.[6]

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[6]Notwithstanding the fact that the Judge of the Probate Court signed his name to an Order which recited that it was made upon full consideration of the evidence and the arguments of adverse counsel, the Tax Court treats the Order as "merely a consent decree entered *pro forma* in a friendly suit." [R. 104.] With due respect to the Tax Court, as members of the State Bar of California we respectfully submit that there is nothing in the record which justified a comment that the California Probate Court acts in a *"pro forma"* manner with respect to any matters, in particular, with respect to proceedings involving the estates of minors.

The Order showed that notice of the hearing was duly given to all parties, including the respondent herein, the Secretary of the Treasury, the Collector of Internal Revenue and Internal Revenue Agent in charge in San Francisco. [R. 83-84.] Despite the fact that respondent had notice of the hearing, the Government failed to appear but elected to wait until the matter got to the Tax Court and then take the position that the California Probate Court proceedings are a nullity. Both the guardian of the minor and the petitioner herein appeared in person and each was represented by counsel. Evidence both oral and documentary was offered and introduced by the respective parties. The issues were argued by counsel and the Court decided that an oral irrevocable trust was created after considering the evidence and the arguments according to its own Order. [R. 83, 98.]

The decision of the California Probate Court has not been reversed or overruled. Respondent has been unable to point to any decision or statute which would indicate that it is erroneous. It is not questioned that under California law the decision is binding upon the guardian and the petitioner.

The Order of the California Court was that ". . . Lois J. Senderman (now Lois J. Newman) orally created an irrevocable trust. . . ." [R. 87.] That decree adjudicated and determined the conflicting interests of the parties before the Court. The decision by the Court having jurisdiction of the parties and the property stands as the final and ultimate determination of the property rights of the parties.

It is clear in the proceedings before the California court that petitioner's interest as settlor of the trust was absolutely adverse to that of the guardian. At that time the

assets held for the minor were considerable in relation to the petitioner's own personal assets.[7] If Mrs. Newman were able to establish that the trust was revocable, she would have received over $300,000.00[8]

Where the claims of the parties are adverse and are determined without fraud and collusion, Probate Court decrees determining such claims are to be given binding effect. That this is the applicable rule of law is recognized by the Court of Appeals for the Sixth Circuit in a decision handed down five days after the Tax Court opinion in this cause was promulgated.

Goodwin's Estate v. Commissioner of Internal Revenue, 201 F. 2d 576 (6th Cir., 1953).

The principal issue in the *Goodwin* case was the binding effect for tax purposes of a decree of a Probate Court. The executrix of the estate (widow of the deceased) filed a motion with the Probate Court requesting approval of claims made against the estate by her daughters. At the hearing on the motion, *ex parte* evidence was received from two of the claimants and oral testimony from another. The Court allowed the claims. The Commissioner of Internal Revenue determined that the claims were not lawful deductions, that the Probate Court decree should be ignored and asserted a deficiency claim. This position

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[7]The value of the trust *res* in 1946 was determined to be "not over $228,831.49" plus $88,529.10, or a *total* of $317,360.59. [R. 21.]

[8]The record is clear that petitioner was a person who dissipated her assets with ease and regularity and, accordingly, had constant need of money. She testified that if she had known the interest in the Aztec Brewery would become as valuable as it did, she "wouldn't have been so anxious to provide for her (the daughter's) future . . ." [R. 127.] There is no reason to believe that in 1946 petitioner didn't want the property back; but she didn't stand a chance of getting it back unless she perjured herself.

was sustained by the Tax Court. The Court of Appeals overruled the Tax Court and recognized the binding effect of the Probate Court decree.[9]

The Court of Appeals expressly rejected the Commissioner's contention that the decree of the Probate Court should not be recognized because there was no contest.

> "Clearly the Probate Court proceeding was not an active and genuine contest for every party to the proceeding agreed that the claims were valid. However, the petitioner was a party having an interest adverse to the interests of the daughters. As widow of the decedent, petitioner was entitled to one-third of the net estate administered in the Probate Court after payment of claims against the estate. * * * It is undisputed that he payment of the claims of the daughters reduced the distributive share of the widow over $30,000. * * *

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[9]It is significant to note that Treasury Regulation 105, §81.30, which the Court of Appeals cited provide that contested proceedings are not a *sine qua non* to recognition of a State court decrees with respect to claims against an estate. A portion of the Regulations quoted by the Court of Appeals reads as follows:

> "Regulation 105, §81.30. *Effect of court decree.* The decision of a local court as to the amount of a claim or administration expense would ordinarily be accepted if the court passes upon the facts upon which deductibility depends. * * * For example, if the question before the court is whether a claim should be allowed the decree allowing it will ordinarily be accepted as establishing the validity and amount of the claim. The decree will not necessarily be accepted even though it purports to decide the facts upon which deductibility depends. It must appear that the court actually passed upon the merits of the case. This will be presumed in all cases of an active and genuine contest. * * * If the decree was rendered by consent, it will be accepted, providing the consent was a bona fide recognition of the validity of the claim—not a mere cloak for a gift—and was accepted by the court as satisfactory evidence upon the merits. *It will be presumed that the consent was of this character and was so accepted if given by all parties having an interest adverse to the claimant* * * *." (*Id.*, 201 F. 2d at pp. 579-580; emphasis supplied.)

"The decree of the Probate Court was rendered after a hearing of which all parties had notice and in which oral testimony was taken. While consent to the entry of the decree was given, it was given 'by all parties having an interest adverse to the claimant.' * * *." (*Id.*, 201 F. 2d at p. 580.)

The Court of Appeals in the *Goodwin* case discussed the origin of the recognition doctrine:

"As to other provisions, the (Treasury) Regulations follow and amplify in practical detail the long existing case law upon this question. In *Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308, 312, 78 L. Ed. 634, it was held that the decree of a state court establishing the rights of beneficiaries under a trust must be considered in applying the Revenue Act of 1921. The court said, 'The rights of the beneficiaries are property rights and the court has adjudicated them.' This was followed by *Blair v. Commissioner,* 300 U. S. 5, 57 S. Ct. 330, 81 L. Ed. 465, opinion by Chief Justice Hughes. * * *

* * * * * * * * *

"Respondent also contends in effect that the Regulations do not apply because the order of the Probate Court was not a decision on the merits. Here the Probate Court in a formal motion was requested to rule upon the validity of the claims involved. Notice was duly given, a public hearing was held, and oral testimony was taken. The Probate Court had exclusive jurisdiction of the subject matter. (Citing authorities.) It was empowered to determine all questions of fact underlying its decisions. (Citing authority.) While an appeal from the order of the Probate Court could have been taken to the Court of Common Pleas, no appeal proceedings were instituted. The Probate Court's decision by its allowance of the claims substantially and adversely

affected the property rights of three beneficiaries of the estate. This was undeniably a decision on the merits and the Regulations were squarely applicable." (*Id.,* 201 F. 2d at pp. 580-581.)

In *Henricksen v. Baker-Boyer National Bank,* 139 F. 2d 877 (9th Cir., 1944), the Commissioner sought to disallow as deductions in the estate tax return bequests for charitable purposes because of the alleged right of the widow to invade the corpus of the estate. Prior to filing of the estate tax return, the executor of the estate and trustee petitioned the Superior Court in Washington for a construction of the terms of the will and the Superior Court ruled that pursuant to the will, the widow did not have the power to invade the corpus.

In the *Henricksen* case the Commissioner argued that the Order of the Superior Court was not entitled to recognition as it was rendered in a non-adversary proceeding; the Commissioner also argued that neither the widow nor the remainder interests were parties to the proceeding. This Court held that the Order of the Superior Court was conclusive of the issue. (*Id.,* 139 F. 2d at p. 882.)[10]

Also see *Letts v. Commissioner of Internal Revenue,* 84 F. 2d 760 (9th Cir., 1936), where this Court held that the Commissioner was bound by a state court order approving, allowing and settling a trustee's account and determining that income was currently distributable to the beneficiaries. (Citing *Freuler v. Helvering, supra.*)

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[10]In the *Henricksen* case notice was not given to all the interested parties. In this cause, respondent is faced with the fact that in addition to giving notice to the interested parties, respondent and all offices associated with respondent were given notice but failed to appear.

Moreover, in *Eisenmenger v. Commissioner of Internal Revenue,* 145 F. 2d 103 (8th Cir., 1944), the Court of Appeals held a state court decree, construing a trust, was binding upon the Commissioner although it was sought and rendered *after* the same issue had been decided against the taxpayer by the Board of Tax Appeals. Of course, the Commissioner in the *Eisenmenger* case raised the cry of "collusion."[11]

Also see:

Channing v. Hassett, 200 F. 2d 514 (1st Cir., 1952);

Nashville Trust Co. v. Commissioner of Internal Revenue, 136 F. 2d 148 (6th Cir., 1943);

Estate of Beachy, 15 T. C. 136 (1950).

As in the *Goodwin* case, the parties having adverse interests were before the Court. It was incumbent upon Miss Shortall, as guardian, to take prompt steps to protect the property of the minor upon learning for the first time that some one considered the 1943 gift by petitioner as being a revocable gift, particularly in view of the fact that petitioner had been dissipating her own assets and might cast covetous glances at the $317,360.59 held by the guardian for the minor. [R. 21, 83-88, 172-174.]

We submit that the validity of the Probate Court proceedings should be presumed. That such presumption is not overcome because there was not a "hotly contested" or "bitter court battle."

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[11]We respectfully submit that that cry of "collusion" is in effect an attack upon the integrity of our state courts. The Commissioner seems to take the position that unless proven otherwise, we are to assume that Probate Courts act *"pro forma"* and will sign anything the attorneys appearing before them may request.

We further submit that the California Probate Court is a court of a sovereign state and it is an integral and respected part of the judicial branch of the California government. Its integrity is presumed; we are not to presume that the Judges of that Court "rubber stamp" what is put before them by the attorneys. Accordingly, the integrity of the Probate Court Order [R. 83-88] is to be presumed and is binding upon respondent.

The Tax Court, in rejecting the California decree on the basis that there was no controversy between the parties cites the *Estate of Ralph Rainger,* 12 T. C. 483 (1949), *affirmed,* 183 F. 2d 587 (9th Cir., 1950). However, the facts in the *Rainger* case are different than the facts presented herein.

The California Inheritance Tax Appraiser included in the Estate of Ralph Rainger, deceased, certain intangible property rights in connection with songs he had written during his lifetime. The executrix filed written objections to the inclusion of this property in Inheritance Tax Appraiser's report. While these proceedings were pending before the Probate Court, a federal estate tax controversy arose as to the inclusion of this property in decedent's estate, and as to whether the alleged property was held by decedent and the executrix as community property or as tenants in common. Thereupon, the executrix amended her objections to the Inheritance Tax Report to contend that if the Probate Court should find that the decedent owned the intangible property rights, that the rights were owned by decedent and the executrix as tenants in common and not as community property.

At the hearing on the objections in the Probate Court, the attorney for the State Controller openly stated in court that insofar as the State of California was con-

cerned, it was indifferent to the question of whether or not the property was held to be community property or tenancy in common. He stated that the issue did not make a "nickel's worth" of difference insofar as California inheritance tax was concerned. Accordingly, there were no adverse interests before the Probate Court. Under those facts, the Tax Court was justified in holding that there was no decision on the merits as to the community property issue.

The Tax Court decision herein also relied on *Saulsbury v. United States,* 199 F. 2d 578 (5th Cir., 1952). [R. 104.]

In the *Saulsbury* case the parties before the state court were a trustee and a beneficiary. The trustee wanted to borrow certain moneys and use the trust income to repay the loan. The beneficiary expressed no objection. The state court decreed that trust income could so be used. The state court did not decide whether the trust income was "distributable" to the beneficiary—which was the tax question presented to the Court of Appeals. The tax question was whether the income was taxable to the beneficiary pursuant to Section 162(b) of the Internal Revenue Code, *i. e.,* taxable as "distributable" income even though not distributed.

In ruling upon the taxation question, the Court of Appeals pointed out that the state "court did not determine whether the trustee or the beneficiary was entitled to the income therefrom." (*Id.,* 199 F. 2d at 581.) Therefore, the Court of Appeals did not have before it the problem of whether the state court decision was or was not binding upon the Commissioner.

Where adverse interests were before the Probate Court, where both parties were present in court and represented

by counsel, where the issue of revocability of the oral trust was squarely presented to the court, where there was no fraud or collusion, the best authority on the law of California is the Order of the California Probate Court. [R. 83-88.] And that decree stated that an oral irrevocable trust was created.

In the within action, we have the following elements to consider with respect to the California Probate Court decree:

1. Adverse interests were before the Court.
2. The Court had jurisdiction over the property.
3. The parties were present in Court and represented by counsel.
4. Evidence was taken by the Court.
5. Oral arguments were made to the Court.
6. The guardian would have been remiss in her fiduciary duties if she had not instituted the proceeding.
7. The Federal tax authorities were given notice of the proceeding.
8. The issue of revocability of the oral trust created in 1943 was squarely before the Court.
9. There was no fraud or collusion.

The Probate Court decree stated that an oral irrevocable trust was created in 1943, and we submit that this decree is the best evidence of the law of California applicable to the property in question and is binding on respondent.

II.

Petitioner Could Not Have Prevented the Distribution to the Guardian on May 2, 1946, or the Making of the Order Holding the Oral Trust Irrevocable.

While respondent and the Tax Court "brush away" the California Probate Court decree, the Tax Court Opinion does not state that petitioner stood the least possible chance of convincing the Probate Court in 1946 that the assets should not be distributed to the minor's guardian but should be returned to petitioner.

In this connection, the following facts should be considered:

1. Even if petitioner wanted to commit perjury and deny that she understood that she could never again touch the 800 shares of stock after she made an oral gift in her conversation with Mr. Goldman, she would find that her oral testimony would be controverted by Miss Shortall, an attorney-at-law. [R. 158-160.]

2. The written instrument prepared and signed by Mr. Goldman and agreed to by petitioner "individually" treated the 800 shares as a completed gift. [Ex. 2-B, R. 38-41.] The trustee agreed to hold the 800 shares for the minor daughter and such other property *as the minor daughter might thereafter deposit with him.* [R. 38.]

3. Petitioner indicated her acknowledgment of the completed gift when she signed said instrument on behalf of her daughter "as the mother and guardian" of her minor daughter. [R. 41.] This indicated that she recognized that the gift was complete and the agreement as to the terms and conditions under which Mr. Gold-

man held the 800 shares was between Mr. Goldman and the minor daughter.

4. If there was any ambiguity in the written instrument, her actions and the actions of Mr. Goldman would have clearly demonstrated the true intention of a completed oral gift in 1943. In light of her 1943 Gift Tax and 1943 to 1945 Income Tax Returns, petitioner was foreclosed from contending in the California Probate Court, in 1946 and in 1947, that she did not make a completed and irrevocable gift in 1943. [R. 27, 31-32, 35-37.]

While respondent contends (and the Tax Court held) that the completed gift was made on May 2, 1946, when the property was transferred to the minor's guardian, respondent does not directly contend that in May, 1946, petitioner could have convinced the Probate Court that the trust property should be returned to her and not delivered to the minor's duly appointed guardian. Accordingly, petitioner could not have done anything in July, 1947, to cause the Probate Court to reach a different result.

Nevertheless, the respondent takes the position that since petitioner did not "controvert" the position of the guardian, the Probate Court is to be ignored. However, no suggestion is made as to how the petitioner could successfully controvert the position of the guardian other than by perjury. Moreover, even if petitioner denied the oral conversations with Mr. Goldman, she could not overcome the written instrument [R. 38-41] wherein she acknowledged and agreed that her daughter was the owner of the 800 shares of Aztec Brewery Company stock.

III.

Petitioner Made a Completed Oral Gift in 1943.

There is uncontradicted evidence herein that early in January, 1943, petitioner, in the presence of Richard S. Goldman and Clarissa Shortall, created an oral irrevocable trust of 800 shares of stock in the Aztec Brewing Company, for the benefit of her daughter, Lois E. Senderman. This oral gift in trust was expressly made effective immediately and was expressly made irrevocable. [R. 125-128, 132, 158-160.] We submit that there is no basis for disregarding this uncontradicted and unimpeached testimony.

The oral gift in trust was not in any way contingent or conditioned upon the execution of the later written instrument. The written instrument was not executed at the time the oral trust was created but was prepared by Mr. Goldman some 6 or 7 months later. [R. 133, 160-162.] It is the common law rule, and the rule in California, that an irrevocable oral trust may be created, and upon such creation may be terminated or revoked only with the consent of all of the beneficiaries.

> *Hellman v. McWilliams,* 70 Cal. 449, 11 Pac. 659 (1886).

In *De Olazabal v. Mix,* 24 Cal. App. 2d 258, 260, 74 P. 2d 787, 788 (1937), the court held that it is "well settled that a trust in personal property need not be in writing, and that no set form of words is necessary to create a trust."

In Scott on Trusts (1939), Volume 3, Section 330.2, the author citing, among other authorities, *Taylor v. Bunnell,* 133 Cal. App. 177, 23 P. 2d 1062 (1933), states:

> "If the terms of the trust are not contained in a written instrument, the revocability of the trust depends upon the manifestation of the settlor's intention as determined by his words and conduct in the light of all the circumstances. Ordinarily, the inference is that the trust is irrevocable unless an intention to reserve a power of revocation can be gathered from the language used by the settlor or from the character of the trust or from the circumstances of its creation."

It is our position herein that the trust was expressly made irrevocable and nothing that was done subsequent thereto could make the completed gift an incomplete gift and make an irrevocable trust a revocable trust.

Respondent has placed great emphasis on California Civil Code, Section 2280. This code section was amended in 1931 to provide that, unless expressly made irrevocable by the instrument creating the trust, voluntary trusts are to be deemed revocable. Since an oral trust is not created by an instrument, we submit that Civil Code, Section 2280, has no applicability to the oral trust. However, we wish to emphasize that it is our basic contention that the oral trust was expressly made irrevocable, was intended to be irrevocable, and that at all times thereafter, petitioner and Mr. Goldman treated the gift of 800 shares as completed. If nothing further had been done; if no written instrument had been executed; if there had been no court proceedings; we submit that the oral gift made by petitioner in January, 1943, was complete and she could not revoke the oral trust which she then created and could not recover the 800 shares of stock she gave her daughter.

IV.

It Was Error for the Tax Court to Disregard the Oral Irrevocable Trust and Determine the Controversy on the Basis of the Written Instrument.

The written instrument involved was not labeled a declaration of trust; the instrument recited an acknowledgment by Mr. Goldman that he was holding, as trustee, certain shares of stock for petitioner and certain shares of stock for petitioner's minor daughter. It treated the transfer to the minor daughter of the beneficial interest of 800 of the shares already held by Mr. Goldman "as Trustee" as a *fait accompli.* In view of the fact that petitioner did not sign as trustor, but signed "individually" and "as mother and guardian" of the minor, plus the fact that "Trustee" agreed to hold other property *deposited with him by the minor* and agreed to deliver the property to the minor's duly appointed guardian, we submit that all the written instrument did was acknowledge that the oral completed gift had already been made.

The Tax Court Opinion states that its decision is based upon *Krag v. Commissioner of Internal Revenue,* 8 T. C. 1091 (1947), and *Gaylord v. Commissioner of Internal Revenue,* 153 F. 2d 408 (9th Cir., 1946), *affirming* 3 T. C. 281. We submit that the decisions in the *Krag* and *Gaylord* cases are distinguishable from the facts presented herein and inapplicable.

In the *Krag* case, the donor created a trust by written instrument in which the donor made himself trustee, and limited the period of time the trust was to remain in effect. The donor, by this written declaration of trust, reserved to himself broad powers as to control of the *res;* however, he did not reserve the right to change or revoke the trust.

In the *Krag* case the trust was created by the written instrument and that was the only act creating the trust. In the within cause, the trust was created orally and the written instrument was not the act that created the trust; the written instrument was a subsequent acknowledgment by Mr. Goldman that he held certain stock "as Trustee," that a portion of the stock was held for petitioner and a portion thereof for petitioner's minor daughter.[12]

The *Gaylord* case involved a written declaration of trust executed in 1935 whereby the donors declared themselves trustees. In the *Gaylord* case, this Court pointed out that the grantors retained powers of management and control over the trust corpus as though they were the absolute owners; their discretion was absolute and uncontrolled and its exercise conclusive on all persons; the donors were able to continue to deal with the property which was the subject of the gift as absolute owners thereof. (*Gaylord v. Commissioner of Internal Revnue, supra,* 153 F. 2d at p. 412.) These facts are unlike the facts herein, where the donor orally made a completed gift in trust, retained no powers over the property, and the written instrument prepared 6 or 7 months later by the trustee (and agreed to by the donor) acknowledged that the minor daughter "owned" the beneficial interest in the 800 shares of stock and did not recite that the donor was giving that to her

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[12]We submit that it should be kept in mind that at the time petitioner created the oral trust in January of 1943, the certificates of stock in question were already in the name of Richard S. Goldman, "as Trustee." [R. 129.]

daughter—the instrument said the daughter "owned" the stock.

The Tax Court in this cause held:

> "* * * On the authority of the *Krag* and *Gaylord* cases cited above, we sustain respondent's holding that the 1943 written trust, here under study, was a revocable trust; that whatever its form, the oral trust was superseded by the written trust; that the transfer of title occurred in 1946 when the written trust was terminated and the trust property transferred to the guardian for the minor, and that petitioner should be taxed accordingly." [R. 107.]

There are three separate holdings in the above quoted portion of the Tax Court Opinion which we would like to consider.

The Tax Court holds that the written instrument was "a revocable trust." The next portion of this Argument will consider that holding in detail. In any event, the written instrument itself is the best evidence and the most persuasive argument against this contention. The written instrument clearly and expressly treats the gift to the minor daughter as completed and irrevocable.

The Tax Court next holds that the oral trust was superseded by the written trust. In this connection, it should be noted that the written instrument in question was not a formal declaration of trust by petitioner; it didn't purport to do anything more than acknowledge that Mr. Goldman had some stock in his name that he was holding for petitioner and for her daughter.

The written instrument treated the gift of the 800 shares of stock as completed. Moreover, Mr. Goldman had no right, whether by mistake or by reason of a document not precisely drawn, to change the legal effect of a complete transaction.[13]

The Tax Court then goes on to hold that the transfer of title occurred in 1946 when the trust was terminated and the trust property transferred to the guardian for the minor. We submit that, subsequent to 1943, there was nothing petitioner could have done to prevent the distribution to the minor's guardian. In this connection, we wish to again stress that the written instrument treated the beneficial interest of the 800 shares as belonging to the minor; and Mr. Goldman entered into an agreement with the minor, through petitioner as her mother and natural guardian, that if a duly appointed guardian of the minor was ever appointed, he would deliver that property, and any other property the minor might deposit with him, to such guardian.

Regardless of the death of Mr. Goldman, the assets held by him on behalf of the minor would have been distributed to the duly appointed guardian of the minor whenever such guardian was appointed.

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[13]In the *Krag* and *Gaylord* cases the written instruments were prepared and executed at the time the transaction was consummated and were the means whereby the trust was created. In the within cause, the written instrument was executed 6 or 7 months later and did not, by its terms, purport to be the instrument making the gift.

V.

The Written Instrument Did Not Create a Revocable Trust.

It is the basic contention of petitioner that there was a completed oral gift in 1943. However, the Tax Court has taken the position that since there was a subsequent written instrument, the evidence of an earlier oral irrevocable trust is to be ignored.

The Tax Court relied upon California Civil Code, Section 2280, which provides, in part, as follows:

> "Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. * * *."

In its Opinion, the Tax Court said:

> "* * * We find it impossible to believe that Goldman, an experienced lawyer, presumptively familiar with the provisions of Section 2280 of the California Code and cognizant of all the facts, would inadvertently omit from the declaration of the trust the express provision called for by the statute. One sentence of five words would have sufficed to have removed all questions as to the revocability of the trust. * * *." [R. 107.]

If Mr. Goldman were alive, he would be in the position to answer the Tax Court. While giving due deference to the fact that we are discussing the work of a deceased attorney, we shall attempt to explain what the Tax Court found so difficult to believe.

We would like to first note that when Mr. Goldman went to law school and during his first two decades of

practice in San Francisco, it was the common law rule and the rule in California that a trust could not be revoked unless the power of revocation was expressly reserved.

Prior to 1931, California Civil Code, Section 2280, read as follows:

> "A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

With this 1931 change in the common law in mind, we submit that the Tax Court was unfair to petitioner in making the presumption that if an irrevocable trust was intended, Mr. Goldman could not have possibly failed to use the words: "This trust is irrevocable."

Moreover, and in fairness to Mr. Goldman, we submit that the written instrument which he signed made it clear that petitioner reserved no control whatsoever over the 800 shares held by Mr. Goldman for the minor daughter. It was not an instrument framed as a declaration of trust by petitioner; accordingly, Mr. Goldman saw no necessity of discussing revocability or irrevocability as he treated the gift as completed and stated that the 800 shares of stock were owned by the minor.

We respectfully submit that the answer to the controversy presented herein can be found by a close scrutiny of the written instrument. [R. 38-41.]

The written instrument signed by Mr. Goldman stated:

1. I have in my possession 2396 7/8ths shares of Aztec Brewery Company stock, which shares stand in my name as "Trustee." [R. 38.][14]

2. Lois J. Senderman (the petitioner herein) is the beneficial owner of 1596 7/8ths of said shares of stock. [R. 38.]

3. Lois E. Senderman, a minor, is the owner of 800 shares. [R. 38.]

4. I agree to hold the minor's 800 shares "and any other property" *the minor* "may hereafter deposit with" me upon the terms and conditions set forth. [R. 38.]

5. I agree to collect the income on the minor's property and to reinvest it. I'll pay the expenses and pay myself a reasonable fee. [R. 38.]

6. I shall have *"the sole and uncontrolled discretion"* to give the minor such income and principal as is in her best interests. [R. 38-39.]

7. If a guardian is ever duly appointed for the minor, I'll turn the property over to the minor's guardian.

8. If no such guardian is ever appointed, I'll give the minor her property when she is 21. [R. 39.]

9. If the minor dies, I'll give her property to her personal representative. [R. 39.]

10. If I don't want to hold the minor's property, I can take action to turn it over to her duly appointed guardian. [R. 39.]

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[14]Two shares were in Mr. Goldman's possession but were not in his name as "Trustee."

11. If I die, then my executors can take the necessary action to turn the minor's property over to her duly appointed guardian. [R. 39-40.]

12. I will render annual accountings. [R. 40.]

13. I am not responsible for any losses or errors in judgment, unless I am wilfully negligent. [R. 40.]

14. Upon termination of my liability as Trustee, I will reimburse myself for all expenses and charges. I can also hold back enough money to take care of contingent obligations. [R. 40.]

15. After payment of all these obligations, I will turn the minor's property over to her. [R. 40.]

16. I want Lois J. Senderman to agree to this "individually" because I want her to be bound to the recital that her minor daughter, Lois E. Senderman, is the "owner of 800 shares" of the Aztec Brewery Company stock. [R. 38, 41.]

17. Since I am entering into an agreement with the minor daughter, Lois E. Senderman, as to the terms and conditions under which I will hold her property (the 800 shares of stock and any other property the minor may deposit with me), and since she has no duly appointed guardian, I want her mother, as the minor's natural guardian, *to agree on behalf of the minor* as to such terms and conditions. [R. 38, 41.]

With this paraphrase of the written instrument, we submit is abundantly clear that Mr. Goldman was saying that, as to the 800 shares, that stock belongs to the minor, Lois E. Senderman, and Lois J. Senderman (petitioner) has no interest therein.

In plain language Mr. Goldman said the minor owns 800 shares and her mother can't get it back.

The Tax Court, citing California Civil Code, Section 2280, held that Mr. Goldman's failure to use the word "irrevocable" in the written instrument is controlling. We submit that when the true nature of the instrument is considered, it becomes clear that Section 2280 is not applicable to such an instrument.

Moreover, Section 2280 uses the phrase "unless expressly made irrevocable" but there is no requirement that the trust instrument use the word "irrevocable." We submit that even without using that magic word, Mr. Goldman's written instrument made it clear that petitioner couldn't get the 800 shares back.

Under the common law rule requiring express reservation of the power of revocation, it was not necessary to reserve the power in *haec verba,* but reservation of the power could "be indicated by the use of language from which it may be inferred." (*Scott on Trusts,* Vol. 3, Sec. 330.1, p. 1797.)

California Civil Code, Section 2280, as originally enacted in 1872, was in effect an adoption of the common law rule that power to revoke had to be reserved. In 1931, this Code section was amended to reverse the rule to overcome the harshness attendant upon inadvertent failure to include a power of revocation. (Cal. Stats. 1931, p. 1955.) The present version was designed to shield settlors against technical errors in draftsmanship. (See *Comment,* 28 Cal. L. Rev. 202, 208 [1940].) The 1931 revision was a remedial statute enacted for the benefit of settlors.

The respondent now seeks, by asking for a strict and narrow construction of the statute, to turn the statute against the settlor who is supposed to be protected by the

statute. We submit that in a case like this where it is conceded that the intent of the settlor was to create an irrevocable trust, where the acts of the settlor precedent to and subsequent to the trust support the contention of irrevocability, the burden should be placed upon respondent to show that such was not the case.

California Civil Code, Section 4, provides:

> "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, *and its provisions are to be liberally construed with a view to effect its objects and to promote justice.*" (Emphasis supplied.)

Decisions with respect to the imposition of taxes should be based on "rational foundations" and not on "linguistic refinement" or the "niceties of the art of conveyancing." (See *Helvering v. Hallock,* 309 U. S. 106, 117, 60 S. Ct. 444, 450 (1940).)

The realities of the taxpayer's economic interest rather than the niceties of the conveyancer's art should determine the power of tax.

> *Helvering v. Safe Deposit & Trust Co. of Baltimore,* 316 U. S. 56, 58, 62 S. Ct. 925, 927 (1942);
>
> *Curry v. McCanless,* 307 U. S. 357, 59 S. Ct. 900 (1939).

> "The rule that the substance of a transaction rather than its mere form, controls tax liability, is one of very wide application. * * * Numerous decisions of the Supreme Court and hundreds of decisions of lower courts have discussed and applied the rule and it is also incorporated in several sections of the (In-

ternal Revenue) Code and the (Treasury) Regulations." (3 *Prentice-Hall Federal Tax Service* (1954), ¶28, 201.)

The Prentice-Hall Tax Service, in its discussion of this basic general principle of the tax law, points out that questions of "substance v. form" are usually raised by the Government, but occasionally the Government is on the other side of the argument. We submit that in the within controversy, the respondent recognizes that as a matter of substance the petitioner gave her daughter 800 shares of Aztec Brewery Company stock in 1943, but seeks to impose $300,000.00 of tax on this $30,000.00 gift because of the form of the transaction.

Moreover, the language in the written instrument clearly and unambiguously provides that insofar as petitioner is concerned, she has already made a completed gift of 800 shares of Aztec Brewery Company stock to her minor daughter and her minor daughter is the absolute and unqualified owner of the beneficial interest in said stock.

Even if the language be considered uncertain or ambiguous, the instrument is to be construed in favor of the beneficiary. (*Ball v. Mann,* 88 Cal. App. 2d 695, 199 P. 2d 706 (1948).)

As heretofore noted, the construction placed on the instrument by the acts of the parties, by filing gift tax returns and otherwise, requires that the ambiguity, if any, be construed to mean that an irrevocable completed gift was made in 1943.[15]

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[15]To borrow a phrase from the Tax Court Opinion—"actions speak louder than words." [R. 106.]

VI.

The Transfer of the Assets to the Guardian in 1946 Did Not Constitute a Taxable Gift.

Assuming, for the sake of argument only, that the irrevocable transfer of the property occurred on May 2, 1946 (the day the Probate Court transferred the assets to the guardian), then even in that event there was no taxable gift in 1946 under the doctrine of *Harris v. Commissioner of Internal Revenue,* 340 U. S. 106, 71 S. Ct. 181 (1950). Under the rule of the *Harris* case, transfers pursuant to court order are not subject to gift tax, regardless of the adequacy of the consideration.

In the *Harris* case, the Supreme Court considered a property settlement agreement between husband and wife which, by its terms, became operative when either party obtained a divorce. The agreement further provided that the agreement should be submitted to the divorce court "for its approval."

When the taxpayer divorced her husband in 1943, the property settlement agreement was incorporated in the divorce decree. It was found that the value of the property transferred to the taxpayer's husband exceeded that received by petitioner by $107,150.00. The Commissioner assessed a gift tax on the theory that any rights which the husband might have given up by entering into the agreement could not be adequate and full consideration. (*Id.,* 340 U. S. at p. 109, 71 S. Ct. at p. 183.)

The Supreme Court agreed that, based on the agreement alone, "there would be no question that the gift tax would be payable." (*Id.,* 340 U. S. at p. 109, 71 S. Ct. at p. 183.)

However, the Supreme Court held that the transfer was not made pursuant to a promise or agreement but was made pursuant to the state court decree and therefore not subject to gift tax although the decree was based upon the written agreement.

> "* * * It is 'the transfer' of the property with which the gift tax statute is concerned, not the sanctions which the law supplies to enforce transfers. If 'the transfer' of marital rights in property is effected by the parties, it is pursuant to a 'promise or agreement' in the meaning of the statute. If 'the transfer' is effected by court decree, no 'promise or agreement' of the parties is the operative fact. In no realistic sense is a court decree a 'promise or agreement' between the parties to a litigation. If finer, more legalistic lines are to be drawn, Congress must do it." (*Id.*, 340 U. S. at pp. 111-112, 71 S. Ct. at p. 184.)

While the *Harris* case involved a property settlement agreement incident to a divorce, the doctrine of that case is not limited to such a situation; it is applicable in all cases where a transfer of property is made pursuant to a state court order, even though the state court order is based on a prior agreement of the parties. There is nothing in the gift tax law that would justify limiting the rule to divorce settlements.

In 1946 the property here in question was transferred pursuant to the Order of the Probate Court; the Order recited the provisions of the written instrument as to appointment of a guardian of the minor and transfer of the property to the guardian. [R. 65-72.] Under the *Harris* rule, transfers pursuant to court order are not subject to a gift tax, regardless of the adequacy of the consideration.

The Tax Court held that the *Harris* case was not applicable herein because in the *Harris* case the element of donative intent was absent. We submit that the only donative intent of petitioner was in 1943, when she created the oral irrevocable trust. The subsequent written instrument was simply an acknowledgment that the gift had been made; and that it was executed in 1943. Accordingly, a holding that there was intent to make a completed gift in 1946 and not in 1943 strains every sense of justice and equity.

Petitioner's contention is that the completed gift was made in 1943. Respondent contends (and the Tax Court held) that the gift was made on May 2, 1946, when the Probate Court made an Order transferring the property to the guardian.[16] If that be respondent's contentention, then respondent is faced with the fact that he has brought the controversy within the rule of the *Harris* case.

In the *Harris* case, the Supreme Court noted that "the purpose of the gift tax is to complement the estate tax by preventing tax-free depletion of the transferor's estate during his lifetime." (*Id.,* 340 U. S. at p. 107, 71 S. Ct. at p. 182.]

We submit that in the within cause the respondent is seeking to enforce the gift tax so that the petitioner's estate will be completely depleted during her lifetime by the payment of $300,000.00 in tax on a $30,000.00 gift.

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[16]Petitioner's position is that in 1946 the Probate Court simply transferred the *minor's property* from the Trustee to the duly appointed guardian for the minor.

Conclusion.

The uncontradicted evidence establishes that in 1943, petitioner made a completed gift to her minor daughter of 800 shares of Aztec Brewing Company stock. This was done by petitioner's oral directions to Richard S. Goldman, in the presence of Clarissa Shortall.

The subsequent written instrument prepared and executed by Mr. Goldman expressly and explicitly stated that the 800 shares were "owned" by petitioner's minor daughter.

The right of the minor to have her property (the 800 shares and other property the minor might deposit with Mr. Goldman) held by Mr. Goldman delivered to her duly appointed guardian was set forth in said written instrument. Accordingly, the Order of the Probate Court on May 2, 1946, transferring the minor's property to her guardian was an act the petitioner could not have prevented.

Aside from the rule of the *Harris* case, we submit there is nothing in the record to justify a finding that the petitioner made a completed gift on May 2, 1946, by reason of said Probate Court Order.

Moreover, the law of California determines when the completed gift was made and the Order of the California Probate Court is the best authority on that subject. The California Probate Court held that an oral irrevocable trust was created by petitioner in 1943. The Tax Court erred in not following that Order.

We respectfully submit petitioner made a completed gift in 1943 and not in 1946, and, accordingly, there is no deficiency in gift tax for the year 1946.

Respectfully submitted,

IRELL & MANELLA,
GANG, KOPP & TYRE,
MARTIN GANG,
LOUIS M. BROWN,
MILTON A. RUDIN,
LAWRENCE E. SILVERTON,

Attorneys for Petitioner.

No. 14112

In the United States Court of Appeals for the Ninth Circuit

LOIS J. NEWMAN (formerly Lois J. Senderman),
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
MEYER ROTHWACKS,
Special Assistants to the Attorney General.

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Statutes:

Miscellaneous:

In the United States Court of Appeals for the Ninth Circuit

No. 14112

Lois J. Newman (formerly Lois J. Senderman),
PETITIONER

v.

Commissioner of Internal Revenue, respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court (R. 93-111) is reported at 19 T. C. 708.

JURISDICTION

The petition for review (R. 112-114) involves a deficiency in gift tax for the taxable year 1946, in the amount of $50,079.84. Notice of deficiency was mailed to the taxpayer on May 3, 1950. (R. 11-14.) The taxpayer filed an amended petition for determination with the Tax Court on November 2, 1951 (R. 17-23), under the provisions of Section 1012 of the Internal Revenue Code. The decision of the Tax Court was entered on

May 15, 1953. (R. 111-112.) The case was brought to this Court by a petition for review filed by the taxpayer on August 10, 1953. (R. 112-114.) Jurisdiction is conferred on this Court by Section 1141 (a) of the Internal Revenue Code, as amended by Section 36 of the Act of June 25, 1948.

QUESTION PRESENTED

Whether the Tax Court correctly held that a transfer of property to a trustee in 1943 did not constitute a completed gift, since the trust was a revocable one under state law, but that the gift was completed in 1946 upon the termination of the trust and distribution of the corpus to the guardian for the beneficiary.[1]

STATUTES AND REGULATIONS INVOLVED

These are set forth in the appendix, *infra*.

STATEMENT

A portion of the facts was stipulated by the parties (R. 26-34), and, by reference, were made part of the Tax Court's findings of fact (R. 94). The additional findings of the Tax Court, pertinent to the issue here involved, are as follows:

The taxpayer resides in California. She was divorced from Aaron Senderman in 1940. Prior to December,

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[1] Another issue decided below is not involved here. The Tax Court held that it was error for the Commissioner to include within the gift consummated May 2, 1946, the amount of $64,035.05, representing an alleged overpayment by the beneficiary and the trust of income tax and accrued interest for 1943 to 1945, inclusive, since the question whether the corpus and the earnings therefrom constituted the taxpayer's property is now pending before the Tax Court in another proceeding. (R. 109-111.) A petition for review of the Tax Court's decision on this issue, filed by the Commissioner for protective purposes, was dismissed by order of this Court on November 18, 1954, upon stipulation of the parties.

1944, and at all times here material, her name was Lois J. Senderman. In December, 1944, she married Louis Newman, and her name from that time to the present has been Lois J. Newman. She has had only one child, Lois E. Senderman, born in 1935. (R. 94-95.)

For a number of years prior to January 1, 1943, the taxpayer owned as her separate property 2,396 7/8 shares of stock of the Aztec Brewing Company, hereinafter called Aztec. On or about January 1, 1943, the taxpayer transferred to Richard S. Goldman, her attorney, 800 shares of the Aztec stock in trust for her daughter. Upon receipt of the stock, Goldman orally declared himself to be trustee, effectively immediately. Six or seven months later, Goldman executed a written declaration of trust which was predated to January 1, 1943, and was not "expressly made irrevocable." (R. 95.)

The taxpayer filed federal and State of California gift tax returns for 1943 in which she reported a gift in trust of the 800 shares of Aztec stock at a value of $30,000, with no gift tax payable thereon. (R. 95-96.)

On or about February 24, 1944, Aztec Brewing Company, a limited partnership was formed. On or about March 31, 1944, the Aztec corporation was dissolved and its assets and liabilities were transferred to the partnership. The stockholders in the corporation became partners in the new partnership, with interests proportionate to their respective stockholdings. The trust for Lois E. Senderman became a limited partner with an eight percent interest, the fair market value of which on May 2, 1946, and throughout the calendar year 1946, was $151,051.09. (R. 96.)

On March 1, 1946, Richard S. Goldman died, and on March 26, 1946, Richard N. Goldman, his son, was appointed and qualified as the executor of his estate. On April 5, 1946, Clarissa Shortall, who had been associated with the elder Goldman and had participated with him in the handling of the trust matters in question, was appointed successor trustee to Richard S. Goldman by order of the Superior Court in and for the City and County of San Francisco, California. The written trust provided for the appointment of a guardian and the creation of a guardianship estate upon the resignation or death of the original trustee. On May 2, 1946, Clarissa Shortall was appointed guardian of the estate of Lois E. Senderman and the assets of the trust were transferred to her. (R. 96-97.)

On April 22, 1947, after a revenue agent had examined the tax returns of the taxpayer and her daughter, and had raised a question as to the revocability of the trust, Clarissa Shortall, as guardian for the minor, filed a petition with the Superior Court for instructions, paragraph 6, which reads in part, as follows (R. 97):

> 6. That it was the intention of said Lois J. Newman, said trustor and donor, and of Richard S. Goldman, said Trustee, that said trust, * * * be irrevocable and that the gift made thereby be irrevocable; and that the failure so to state specifically in said Declaration of Trust occurred through inadvertence and error and contrary to the express instructions of said Lois J. Newman.

On June 23, 1947, she filed an amended petition for instructions in which, for the first time, reference was

made to the existence of an oral trust. This petition stated that through inadvertence and error the written trust had failed to contain an express provision as to its irrevocability. (R. 97-98.)

On June 24, 1947, the taxpayer filed a gift tax return for 1946 as a protective measure. The return stated that no gift had been made in 1946, and it showed no tax owing for that year. (R. 98.)

On July 10, 1947, a hearing was held on the amended petition for instructions. Oral and documentary evidence was offered. Clarissa Shortall, as guardian, and the taxpayer appeared in person and by their respective attorneys. The court decreed that (R. 98-99):

> 1. On or within a few days after January 1, 1943, said Lois J. Senderman (now Lois J. Newman) orally created an irrevocable trust by instructing Richard S. Goldman to act as trustee of 800 shares of stock of Aztec Brewing Company, the certificates of which he held in his possession and by said Richard S. Goldman orally agreeing to do so. Said oral trust became effective immediately upon its creation and continued in effect until terminated by the appointment of Clarissa Shortall as guardian of the estate of said minor on May 2, 1946, and the transfer on or about said date of said trust property to said guardian.
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> 2. Some six or seven months after the creation of said oral trust said Richard S. Goldman executed a written trust. * * * Said written trust was intended to embody the terms of said oral trust.
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> 3. Said written trust did not terminate or modify said oral trust theretofore created but said

oral trust continued in effect until terminated on May 2, 1946, by the appointment of Clarissa Shortall as guardian of the estate of said Lois E. Senderman and the transfer of the trust property to her as said guardian.

4. Said Clarissa Shortall as such guardian has held and now holds said property irrevocably for the use and benefit of said minor.

With respect to the written trust, the Tax Court held that it was not expressly made irrevocable by the instrument creating it and was therefore revocable under California law. With respect to the oral trust, the Tax Court held that it, too, was revocable. This conclusion rested not only upon substantial evidence that the oral trust was not intended to be irrevocable but also upon the fact that it was replaced by the written trust. As to both trusts, the Tax Court held that the state court decree of July 24, 1947, was not binding for federal tax purposes because, in the circumstances of the case, it did not represent an independent judgment in a real controversy between the parties. Having found that neither of the trusts created in 1943 was, under state law, irrevocable, and that, accordingly, no completed gift was consummated in that year, the Tax Court held that the May 2, 1946, transfer of trust assets to the guardianship estate of the taxpayer's daughter constituted a completed gift, with consequent gift tax liability in that year. In connection with this transfer, the Tax Court held that the state court which ordered it did not act as an arbiter between two contesting parties but that its function was merely to see that the transfer was in accord with the trust instru-

ment and that it exercised discretion only with respect to the appointment of a fit guardian. (R.104-109.)

SUMMARY OF ARGUMENT

The taxpayer made no completed gift of the Aztec stock in 1943. The written trust executed in that year was patently revocable, since, as required by California law, it was not expressly made irrevocable. The oral trust (whether or not California law at that time permitted the creation of an irrevocable oral trust) was intended to be revocable, as the Tax Court found. Furthermore, it was replaced by the written trust instrument. The 1947 decree of the state court did not retroactively fix the quality of irrevocability upon both the oral and written trusts for federal tax purposes, since, in the circumstances of this case, the proceedings did not involve a real controversy between the parties. A completed gift of the Aztec stock was effectuated in 1946 when, upon the death of the trustee and pursuant to the provisions of the written trust instrument, the stock was unconditionally transferred to the guardian for the taxpayer's daughter. Although the transfer was sanctioned by court order, imposition of the gift tax was not thereby foreclosed under the doctrine of *Harris* v. *Commissioner,* 340 U.S. 106, since the operative factor in the transfer was the written trust agreement itself and the role of the court was a limited one.

ARGUMENT

The Tax Court Correctly Held That Completed Gifts Were Not Effectuated in 1943 by Either the Oral or Written Trusts, Both of Which Were Revocable, But That a Transfer Evoking Gift Tax Liability Was Made for the First Time in 1946 When the Written Trust Was Terminated and the Corpus Was Distributed to the Guardian for the Beneficiary

A. *The controlling written instrument created a revocable trust.*

The issue in this case is a narrow one. Did the taxpayer transfer property subject to the gift tax provisions in 1943, when, as she contends, she had irrevocably transferred certain shares of stock in trust for the benefit of her minor daughter—or, as the Commissioner and the Tax Court determined, and as we contend, was a completed gift first effectuated in 1946 (and a gift tax owing as of that year) when the revocable written trust was terminated and distribution of its corpus was made to a guardian for the minor?

The basic facts, as found by the Tax Court, may be briefly summarized as follows: On January 1, 1943, the taxpayer orally transferred to her attorney certain shares of stock of the Aztec corporation to be held by him in trust for her minor daughter. Six or seven months later a written declaration of trust was executed. It was pre-dated to January 1, 1943. It was not expressly made irrevocable and it made no reference at all to the existence of any oral trust. The taxpayer filed a federal gift tax return for 1943, reporting the value of the alleged gift of stock to the trust as $30,000, with no gift tax owing thereon. In 1944, the Aztec corporation was dissolved. Its assets were transferred to a partnership in which the trust became a

limited partner with an eight percent interest, the value of which throughout the calendar year 1946 was $151,051.09. On March 1, 1946, the trustee died. On April 5, 1946, Clarissa Shortall, an attorney who had been his associate and who had participated in the handling of the trust matters, was appointed as successor trustee. The oral trust was not mentioned in the petition filed for the appointment of the successor trustee. The provisions of the written trust required that upon the resignation or death of the original trustee the trust was to terminate and a guardianship estate was to be created. Pursuant thereto, on May 2, 1946, Clarissa Shortall was named guardian and the assets of the trust were transferred to her. No mention of any oral trust was made in the petition for appointment of guardian or in the order appointing the guardian. On April 22, 1947, after a revenue agent who had examined the tax returns of the taxpayer and of her daughter had raised some question concerning the revocability of the trust, the guardian filed a petition for instructions in the Superior Court in which she alleged that the taxpayer and the original trustee had intended the trust to be irrevocable and that (R. 76), "through inadvertence and error and contrary to the express instructions" of the taxpayer, the declaration of trust had failed to state that it was irrevocable. This petition made no reference to any oral trust. On June 23, 1947, the guardian filed an amended petition for instructions, in which, for the first time, reference was made to an oral trust. A hearing on the amended petition was held on July 10, 1947. Appearances were entered by the guardian and the taxpayer and their respective attorneys but, as the Tax Court observed,

the proceeding involved no real controversy between the parties. The Superior Court decreed (1) that the oral trust entered into on or about January 1, 1943, was an irrevocable trust which became effective immediately upon its creation and which continued until May 2, 1946, when the guardian was appointed and the assets of trust were transferred to her; (2) that the declaration of trust executed thereafter was intended to embody the terms of the oral trust; and (3) that the written trust did not terminate or modify the oral trust.

Upon these facts, we submit that the Tax Court correctly concluded that the written declaration of trust, and not the oral trust, is controlling here, that, under California law, the written instrument clearly created a revocable trust; that, after its termination, it was not made retroactively irrevocable for federal tax purposes by state court proceedings which did not constitute a real and bona fide controversy between the parties; and that there was therefore no valid transfer of title for gift tax purposes until 1946, upon termination of the revocable trust and unconditional transfer of the trust property to the guardian for the minor.

The written trust instrument was executed in 1943. Under the applicable California law (Deering, Civil Code of California (1937), Section 2280 (Appendix, *infra*)), every voluntary trust which was not expressly made irrevocable by the instrument creating it was revocable. The instrument here was a voluntary trust, since it constituted an obligation arising out of a personal confidence reposed in and voluntarily accepted by the trustee for the benefit of the taxpayer's daughter. Deering, Civil Code of California (1937), Section 2216

(Appendix, *infra*). It was not an involuntary trust, since it was not created by operation of law. Deering, Civil Code of California (1937), Section 2217 (Appendix, *infra*). As the Tax Court found, and as appears obvious from a reading of the instrument (R. 38-41), it was not expressly made irrevocable.[2] Whether, as the taxpayer claims, this was through oversight, or whether, as the Tax Court in effect found upon full consideration of the evidence, it was deliberate, is immaterial. It was under California law, a revocable trust (*Gaylord* v. *Commissioner,* 153 F. 2d 408 (C.A. 9th); *Krag* v. *Commissioner*, 8 T.C. 1091), and if the taxpayer had elected to exercise her right to revoke it, the trustee would have been under an obligation to

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[2] The taxpayer has tenuously attempted (Br. 23-24, 31-37) to glean from the language of the written instrument some intimation that 800 shares of Aztec stock were therein treated as a completed gift. A similar argument was unsuccessfully made in *Krag* v. *Commissioner,* 8 T. C. 1091, 1095-1096. There, the taxpayers contended that the trust agreements were not mere declarations of trust but contained language in effect evidencing gifts *inter vivos.* But the court held that the retention of legal title by a donor or third person to hold for the purposes of trust pointed to gifts in trust. The same conclusion is required in the instant case. As stated in *Colton* v. *Colton,* 127 U. S. 300, 310: "If it appear to be the intention of the parties from the whole instrument creating it that the property conveyed is to be held or dealt with for the benefit of another, a court of equity will affix to it the character of a trust, * * *." The written trust (Ex. 2-B, R. 38-41) makes it clear that Richard S. Goldman was holding "certificates of stock as trustee", that Lois E. Senderman was one of the "beneficial owners", and that he was holding 800 shares of Aztec stock for her upon terms and conditions consistent only with the declaration of a gift in trust. It may also be observed that while, on the one hand, the taxpayer appears to rely upon the written instrument as a mere acknowledgment "that the oral completed gift had already been made"—and not as a trust—(Br. 27), she nevertheless appears to imply, although guardedly (Br. 35), that the written instrument was a trust and that appropriate words of irrevocability were used, albeit short of the "magic word"—"irrevocable."

transfer to her the "full title to the trust estate." Section 2280, California Code. In failing to create an expressly irrevocable trust, the taxpayer in substance had reserved the power to revest the beneficial title to the property in herself. Clearly, therefore, the transfer under the written trust instrument did not effectuate a completed gift. A gift is complete where "the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another" but "is incomplete in every instance where the donor reserves the power to revest the beneficial title to the property * * *." Treasury Regulations 108, Section 86.3 (Appendix *infra*). The gift tax statute is "aimed at transfers of the title that have the quality of a gift, and a gift is not consummate until put beyond recall." *Burnet* v. *Guggenheim,* 288 U.S. 280, 286.

In an attempt to overcome the patent defect in the written trust, i.e., that it was not expressly made irrevocable, the taxpayer contended in the Tax Court that (1) the written trust was in fact irrevocable because it was intended to embody the terms of the prior and alleged irrevocable oral trust and (2) in any event, the Superior Court's order of July 24, 1947, was a conclusive determination *nunc pro tunc* that the written trust (as well as the oral trust) was irrevocable.[3]

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[3] The Tax Court restated the taxpayer's position below as follows (R. 103):

> Petitioner * * * maintains that not only does the *trust instrument* in controversy meet the requirements of section 2280 * * * as respects its irrevocability but also that the oral trust earlier created was intended to be, and was, irrevocable, and that *both trusts* remained in existence from the time they were created until they were both terminated in 1946. To support

Neither of the contentions has merit. As to the first, it may be observed preliminarily that there was no ambiguity in the written trust instrument and that therefore, as this Court stated under analogous circumstances in *Gaylord* v. *Commissioner, supra,* p. 415, its plain terms will control. Contrary to the taxpayer's contention (Br. 31-37), nothing in the language of the trust instrument even remotely suggests that it was the taxpayer's intention that the trust be irrevocable. The instrument is silent in this respect. Acts of the taxpayer, such as the filing of gift tax returns reflecting a completed gift in 1943 cannot, as the taxpayer contends (Br. 37), have the effect of amending the trust declaration. In reply to a similar argument in the *Gaylord* case, *supra,* this Court stated (p. 415):

> These returns were simply a report to the Government required by law and did not purport to change the nature of the trust. Any effective changes had to be made in the instrument itself.

Furthermore, even if it is assumed, *arguendo,* that the written trust was intended to embody the terms of the

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this position, petitioner points to the July 10, 1947 decree [filed July 24, 1947] of the Superior Court * * * so construing the *trusts.* (Italics supplied.)

The italics in the above excerpt point up a seeming shift in argument here. Point IV of the taxpayer's brief (pp. 27-37), appears now to assume that the written instrument was not a declaration of trust at all but rather a mere acknowledgment "that the oral completed gift had already been made." (P. 27). The apparent purpose of this shift is to emphasize the taxpayer's now virtually complete reliance upon the oral trust. This position appears to be echoed in Point V of the taxpayer's brief. (Pp. 31-37.) The intent of the argument there, however, is somewhat obscured by the concomitant effort to reconcile the "instrument", as the taxpayer consistently refers to it, with the provisions of Section 2280 of the California Code.

oral trust, the Tax Court nevertheless concluded, upon full consideration of the evidence, that the oral trust was intended to be revocable. The substantial basis for this conclusion is discussed below, in subdivision B.

With respect to the Superior Court's order of July 24, 1947, purporting to fix the quality of irrevocability to the written (and also to the oral) trust, the Tax Court properly held that it was not controlling for federal tax purposes since the proceedings before the state court did not constitute a real and bona fide controversy between the parties and the judgment of the court was in effect a consent decree. The facts support this conclusion. The petition for instructions filed by Clarissa Shortall, after the trust had terminated, alleged that some controversy had arisen between herself, as guardian, and the taxpayer relative to its irrevocability of a written trust. The guardian requested the court to find that the written trust was irrevocable. (R. 76-77.) At the hearing, the taxpayer testified and also urged the court to declare the written trust irrevocable. (R. 173.) Obviously, therefore, both parties were requesting the same finding. At the hearing in the Tax Court, the guardian stated that she had petitioned the Superior Court in 1947 because she feared that the trustor might try to have the trust revoked. (R. 172.) But she knew that by its very terms, whether revocable or irrevocable, the trust had terminated in 1946; and she further knew that she had received possession of the corpus in that year as guardian and that legal title had passed to the beneficiary. It is apparent, therefore, that the state court proceeding did not involve a real contest; rather, it represented a concerted action to obtain what in effect was a consent decree which

would adversely affect the Government's right to a gift tax. In these circumstances—which factually distinguish the instant case from those relied upon by the taxpayer (Br. 15-19)[4]—the tax court was not bound, as the taxpayer contends (Br. 13), to follow the state court order, as allegedly required by *Freuler* v. *Helvering,* 291 U.S. 35. There, the Supreme Court did recognize and give effect to a decision of a state court determining property rights. But, as stated in *Doll* v. *Commissioner,* 2 T.C. 276, 284, affirmed, 149 F. 2d 239 (C.A. 8th), certiorari denied, 326 U.S. 725:

> The Supreme Court indicated, however, that the decision must have been entered in a proceeding where there was a real controversy to be determined and after such trial as would properly and fully present the facts and issues. On the other hand, the inference is clear that it would not recognize and give effect to the decision of a state court in a proceeding which was "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax."

In *Saulsbury* v. *United States,* 199 F. 2d 578, 580 (C.A. 5th), certiorari denied, 345 U.S. 933, in dealing with a similar problem the court stated—

> it does not affirmatively appear that said order was obtained in an adversary proceeding and that

[4] The taxpayer's extended discussion (Br. 15-18) of *Goodwin's Estate* v. *Commissioner,* 201 F. 2d 576 (C.A. 6th), is inapplicable here since, to a substantial degree, that case turns on the application of a specific regulation to a specific subject, namely, the effect of a local court decree upon the amount of a claim against or the administration expenses of an estate.

there was no collusion. By the word *collusion,* we do not mean to imply fraudulent or improper conduct, but simply that all interested parties agreed to the order and that it was apparently to their advantage from a tax standpoint to do so. we mean that there was no genuine issue of law or fact * * * and no *bona fide* controversy * * * as to the property rights under the trust instrument.

In *Krag* v. *Commissioner, supra,* which the Tax Court characterized (R. 104) as strikingly similar to the instant case, the taxpayers executed trusts for the benefit of minor children which, as here, contained no express provision as to irrevocability. Subsequently, the Superior Court in and for the County of Marin, California, issued an order reforming the trusts and declaring them irrevocable *ab initio.* The Tax Court held that the trusts were revocable, under the provisions of Section 2280 of the California Code and, further, that the subsequent state court decree, purporting to establish irrevocability, was ineffectual for federal tax purposes. In language pertinent here, the court stated (pp. 1097-1098):

> It is true that the decree in the reformation suit ordered that each trust agreement "be reformed as of its original date to express the true intention of all of the parties thereto." It is also true, as contended by petitioners, that the cited cases hold that decisions of state courts determining property rights are binding upon Federal courts. However, such rule applies only to a decision entered in a proceeding presenting a real controversy for de-

termination. The decision must be on issues "regularly submitted and not in any sense a consent decree." *Freuler* v. *Helvering,* 291 U. S. 35, see also *Francis Doll,* 2 T. C. 276; affd., 149 Fed. (2d) 239; certiorari denied, 326 U. S. 725; *Tatem Wofford,* 5 T. C. 1152, 1161-1163; *Leslie H. Green,* 7 T. C. 263, 274. In the suit herein involved there was no real controversy. The purpose of the suit was to reform and amend the trust agreements so as to bring them without the purview of section 2280, i.e., to make them irrevocable. All the parties to the suit were in agreement in that respect. The petitioners, in so far as the records disclose, may have initiated the reformation suit, and probably did, since the beneficiaries were minors and there is no evidence of any controversy. The cases cited by petitioners are distinguishable and hence not applicable. They involved decisions of state courts of competent jurisdiction rendered in adversary proceedings after a hearing upon the merits, all of which decisions were in no sense consent decrees or "collusive in the sense that all the parties joined in a submission of the issues and sought a decision which would adversely affect the Government's right to additional income tax." *Freuler* v. *Helvering, supra.* In *Sinopoulo* v. *Jones* (C. C. A., 19th Cir.), 154 Fed. (2d) 648, the taxpayer executed declarations of trust for the benefit of his two daughters. Thereafter, effective as of August 1, 1941, Oklahoma passed a statute providing that every trust created under the laws of Oklahoma "should be revocable by the trustor unless expressly made irrevocable by the instrument creating the same." Because of the stat-

ute and of a doubt as to the construction that might be attempted to be placed upon the declarations of trust, taxpayer's daughter Mary, who had married against his will, brought suit for herself and as the next friend of her minor sister against taxpayer, asking for a construction as to the revocability of the trusts and for a reformation thereof. The court reformed the trust instruments by striking out a certain paragraph therein and inserting in lieu thereof another paragraph reading in part, as follows: "The trusts hereby created shall be and are irrevocable." The judgment of the court made the reformation retroactive and effective as of December 14, 1939, the date of the execution of the written declarations of trust. As to the effect of such judgment, the Circuit Court stated:

> The liability of appellant for the income tax chargeable to the income of the trusts for the years in question [1939, 1940, and 1941] must be determined from the provisions of the trusts prior to their reformation by the state court. While the judgment of the state court made the reformation of the trusts retroactive and effective as of the date of the execution, this could not affect the rights of the government under its tax laws.

The court held that the tax liability of Sinopoulo for the three years in question was to be determined from the provisions which he included in the declarations of trust which he executed, and not from what he intended to include therein.

The *per curiam* opinion of this Court in *Estate of Rainger* v. *Commissioner,* 183 F. 2d 587, affirming 12 T. C.

483, certiorari denied, 341 U. S. 904, is in accord, in principle. In that case, one of the questions was whether a California court's decision in an inheritance tax proceeding, that the decedent owned no community property, was a decision on the merits. Upon analysis of the proceeding (12 T. C. 483, 495-496), it was concluded, as in the instant case, that there was no real controversy between the parties on that issue and that the purported adjudication of property rights by the state court was therefore not binding upon the federal court.

It is submitted that the Tax Court properly held that the Superior Court's decree in the instant case was not retroactively effective for federal tax purposes. In the circumstances of the case, a contrary ruling would not only have disregarded the absence of a real controversy between the parties to the state court proceeding, but, in effect, would have permitted a retroactive judgment of a state court, contrary to the well established rule, to determine the rights of the Federal Government under its tax laws. .Cf. *Daine* v. *Commissioner,* 168 F. 2d 449, 451-452 (C. A. 2d) ; *Doll* v. *Commissioner, supra; Van Vlaanderen* v. *Commissioner,* 175 F. 2d 389 (C. A. 3d).

B. *There was no completed gift in 1943 under the oral trust.*

The oral trust was created on or about January 1, 1943. Even if it is assumed (1) that an oral irrevocable trust could have been created under California law in 1943,[5] and (2) that the oral trust here involved

[5] The applicable California law, as we have already observed, provided that *every* voluntary trust was revocable "Unless expressly made irrevocable by the instrument creating the trust * * *." Section 2280, California Code. The oral trust in this case was a volun-

was irrevocable, the taxpayer nevertheless cannot prevail. The undisputed fact is that the written trust was pre-dated to January 1, 1943, the date of the creation of the oral trust. Unless the written trust was intended to replace the oral trust, the pre-dating is meaningless. Since it would indeed be anomalous to assume the co-existence of two trusts, one oral and one written, involving the same corpus, the Tax Court correctly concluded (R. 106) that the substitution of the written instrument for the oral declaration rendered the oral trust "wholly void" and "effectively wiped out."

But the Tax Court's rejection of the oral trust as a controlling factor here was based primarily upon its conclusion that it was not intended to be irrevocable. The Tax Court held that the taxpayer's contrary position in this respect was not entitled to credibility because of "The inconsistencies in the evidence, the presence of contradicting documents, and the inferences to be drawn from the whole record * * *." (R. 106.) In this connection it was, of course, the Tax Court's function, as it properly observed (R. 106)—

> to weigh the evidence carefully, determine the probabilities of accuracy, and accept or discount the evidence by consideration of the interests of

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tary one, and, by definition, an oral trust is not created by any instrument. The creation of an oral irrevocable trust in 1943, would therefore appear to be questionable. Contrast this with the situation which existed under the California law (Ragland, Civil Code of California, Annotated (1929), Section 2280) prior to its amendment in 1931, when no trust could be revoked after its acceptance by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserved a power of revocation to the trustor. *Title Ins. & Trust Co.* v. *McGraw*, 72 Cal. App. 2d 390, 399, 164 P. 2d 846.

the parties, and thus, from the whole record, determine where lies the truth.

If its conclusion "that no irrevocable oral * * * trust existed" (R. 106) is supported by the record, it should not be disturbed, since as this Court has stated in *Gaylord* v. *Commissioner,* 153 F. 2d 408, 415: "Weighing the evidence, determining its probative value and drawing inferences therefrom is peculiarly and exclusively the function of the Tax Court." That the record did raise substantial doubt as to the existence of an irrevocable oral trust is clear. The oral trust was created on or about January 1, 1943. Six or seven months later, the written declaration was executed and it was pre-dated to January 1, 1943. Yet, the written instrument made no mention of any oral trust, either revocable or irrevocable. The Tax Court considered this omission significant, stating (R. 105):

> The existence of the oral trust was not mentioned in the written instrument, albeit petitioner now contends it was in full force and effect for six or seven months. When the written trust was being prepared, two lawyers, one of them the trustee under the trust, the other his associate and successor as advisor to the trust, both experienced and fully cognizant of the desires of the donor, participated in the drafting of the instrument. Despite the fact, if it be a fact, that both lawyers understood that petitioner wished an irrevocable trust, no reference was made to an existing irrevocable oral trust nor was the word "irrevocable," or any word to the same effect, used or incorporated specifically, or by interpretation or by proper inference, in the writing.

The Tax Court further stated (R. 107):

> If the oral trust was intended to be irrevocable, why, when it was transmuted into the written trust, did the written trust fail to mention either the oral trust or the word "irrevocable"? We find it impossible to believe that Goldman, an experienced lawyer, presumptively familiar with the provisions of Section 2280 of the California Code and cognizant of all the facts, would inadvertently omit from the declaration of the trust the express provision called for by the statute. One sentence of five words would have sufficed to have removed all question as to the revocability of the trust. * * *

In addition, the Tax Court found it (R. 105) "difficult to comprehend * * * that the oral trust on which the petitioner now so heavily leans was not mentioned" (1) in the petition filed by Clarissa Shortall on April 5, 1946, for the appointment of a successor trustee or (2) in the petition thereafter filed for her appointment as guardian of the estate of the taxpayer's daughter; or (3) in the order of May 2, 1946, appointing her as guardian; or (4) in the original petition filed by her on April 22, 1947, for instructions concerning the nature of the trust, *despite the fact that prior thereto a revenue agent had examined the tax returns of the taxpayer and her daughter and had raised a question as to the revocability of the trust* (R. 97). The original petition referred only to the written instrument and stated in part (R. 76):

> 6. That it was the intention of said Lois J. Newman, said trustor and donor, and of Richard S.

> Goldman, said Trustee, that said trust, * * * be irrevocable and that the gift made thereby be irrevocable; and that the failure so to state specifically in said *Declaration* of Trust occurred through inadvertence and error and contrary to the express instructions of said Lois J. Newman. (Italics supplied.)

The first reference to an oral trust was made on June 23, 1947, when the guardian filed an amended petition for instructions. The timing would appear to be significant. As already noted, the original petition for instructions was filed on April 22, 1947, and it referred only to the written declaration of trust, a copy of which was attached. (R. 74.) This petition requested (R. 77) "a decree * * * declaring that said trust and the gift made thereby were irrevocable * * *." The taxpayer appeared to be following the method employed in the *Krag* case, *supra,* namely, an attempted *ab initio* reformation of a written trust instrument by court decree in order to establish its irrevocability. The decision in the *Krag* case, which made it clear that that method would not succeed, was handed down on May 16, 1947. The amended petition for instructions here was filed on June 23, 1947. (R. 29-30, 97).) Significantly, it referred to the *oral* and written trusts and prayed *inter alia* (R. 82)—

> for a decree * * * declaring that said Lois J. Senderman *orally* created an irrevocable trust * * *; that said oral trust * * * terminated by the appointment of * * * [the] guardian and the transfer of the trust property to * * * [the] guardian; * * *." (Italics supplied.)

The circumstances would suggest that the hypothesis of an irrevocable oral trust which purportedly continued in existence from January 1, 1943, to May 2, 1946, was relied upon in order to overcome the obstacle of the *Krag* decision. However, as we have already observed, the Tax Court was not required to predicate its rejection of the taxpayer's position upon any inference flowing from the chronological and factual relationship between the *Krag* decision and this case, for, upon a consideration of the "whole record ~~record,~~" including the testimony of the taxpayer and her lawyer, the Tax Court found as an ultimate fact that "no irrevocable oral * * * trust existed." (R. 106.) This finding, in the light of the evidence supporting it, is not clearly erroneous and should be sustained. Rule 52 (a), Federal Rules of Civil Procedure; *United States* v. *Gypsum Co.,* 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869.

C. *The transfer of trust assets to the guardian in 1946 pursuant to court order does not foreclose imposition of the gift tax under the doctrine of Harris v. Commissioner.*

Although there was no completed gift here in 1943, the Tax Court nevertheless found that the taxpayer (R. 108) "harbored the same donative intent at all times here material", including 1946. Under the terms of the written trust instrument, the death of the original trustee in 1946 required the termination of the trust and the transfer of its corpus to a guardian for the taxpayer's daughter. The concomitance, on

May 23, 1946, of donative intent[6] and unconditional transfer of the property to the guardian gave rise to a completed gift, with consequent gift tax liability in that year. Internal Revenue Code, Sections 1000 and 1002 (Appendix, *infra*).[7] Cf. *Latta* v. *Commissioner,* 212 F. 2d 164 (C.A. 3), and *Camp* v. *Commissioner,* 195 F. 2d 999 (C.A. 1st), involving transfers in trust in which the settlors had retained powers to revoke or revise, dependent upon the agreement of others without adverse interest. It was held that the original transfers did not constitute completed gifts for federal tax purposes, but that gift tax liability was properly evoked in subsequent years upon actual deletion or relinquishment of the powers to amend.

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[6] Even in the absence of a specific finding of donative intent in 1946, the gift tax may be predicated on the unconditional transfer of property to the guardian without receipt of full and adequate consideration of money or money's worth. Cf. *Commissioner* v. *Wemyss,* 324 U. S. 303, 306-307; *Merrill* v. *Fahs,* 324 U. S. 308, rehearing denied, 324 U. S. 888; *Farid-Es-Sultaneh* v. *Commissioner,* 160 F. 2d 812, 816 (C.A. 2d); *Rosenthal* v. *Commissioner,* 205 F. 2d 505, 509-510 (C.A. 2d); *Commissioner* v. *Greene,* 119 F. 2d 383, 386 (C.A. 9th), certiorari denied, 314 U. S. 641.

[7] Note, in this regard, the taxpayer's conditional statement in accord in the schedule attached to her 1946 gift tax return (Ex. 12-L, R. 91):

> The Revenue Agent's office of the Bureau of Internal Revenue, in the course of the examination of donor's income tax return for 1943, has raised a question as to whether said trust was irrevocable. However, if said trust was a revocable gift of said property, * * * the gift of said property became irrevocable upon the death of Richard S. Goldman, the trustee, on March 1, 1946, and the appointment of Clarissa Shortall as guardian of the estate of Lois E. Senderman, a minor, thereafter on May 2, 1946, by the Superior Court of the State of California, in and for the City and County of San Francisco * * * and the transfer of the trust property to said guardian immediately thereafter. * * *

But the taxpayer, relying on *Harris* v. *Commissioner,* 340 U.S. 106, contends that the May 2, 1946, transfer of trust assets to the guardianship estate did not represent a taxable gift because it was made pursuant to court order. The contention is without merit. In the *Harris* case, a settlement of marital property rights between husband and wife, operative by its terms only on entry of a divorce decree, was held exempt from gift taxes. The Court found that the settlement was not based on a voluntary promise or agreement of the parties, but on the command of the divorce court which was required by state law to decree a just and equitable disposition of the parties' property. However, as the Tax Court pointed out (R. 108-109):

> The factual situation present in the *Harris* case is clearly distinguishable at critical and important points, and would appear to have no application here. That case involved a divorce proceeding and a property settlement agreement incident thereto. The settlement in question was clearly an arm's length transaction. The element of donative intent was absent. Nor was a promise or an agreement an operative factor. The transfer was made dependent upon and pursuant to a decree of a court charged under state law with decreeing a just and equitable disposition of the community and separate property of the parties before it. Nevada Compiled Laws, Section 9463.
>
> Although [in the instant case, the taxpayer] * * * failed legally to effectuate a valid gift for tax purposes, since, as we have seen, it was done by a trust revocable under California law, she, nevertheless, harbored the same donative intent

> at all times here material. *Moreover, the role of the state court here* [*with respect to the transfer of trust assets to the guardianship estate*] *was not that of arbiter between two contesting parties. The terms of the trust instrument itself provided for the termination of the trust and the transfer of the corpus thereof to a guardian. As is customary in the cases involving property rights of a minor, application was made to a court of competent jurisdiction for authorization so to transfer the trust assets and for appointment of a guardian to receive and hold the same. The court's function was merely to see that the transfer was in accord with the trust instrument and to appoint a fit guardian. It exercised discretion only with respect to the latter.* (Italics supplied.)

In these circumstances, the state court's imprimatur upon the transfer of May 2, 1946, should not bring this case, *ipso facto,* within the scope of the *Harris* doctrine. The Tax Court correctly observed (R. 109):

> Such broad application [of the doctrine] would have the effect of repealing by judicial process the gift tax statute and would make possible avoidance of a gift tax by the simple expedient of making any gift contingent upon a consent decree of a local court. We cannot believe that the Supreme Court intended or contemplated any such result.

The taxpayer's contention (Br. 39) that the doctrine of the *Harris* case "is applicable in *all* cases where a transfer of property is made pursuant to a state court order" (emphasis supplied) should not be accepted, for it would indeed frustrate "the evident desire of Con-

gress [in imposing the gift tax] to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech * * *." *Commissioner* v. *Wemyss, supra,* p. 306. In this connection, see Taylor and Schwartz, Tax Aspects of Marital Property Agreements, 7 Tax L. Rev. 19, 38-49 (November, 1951), wherein discussion of the gift tax aspects of the broad extension of the doctrine here contended for by the taxpayer is concluded with the admonition (p. 49):

> The consequences to the revenues of such a broad application of the *Harris* case appear to require the strictest limitation of that case to its actual facts.

The authors make it clear (p. 47) that the legislative history of the gift tax does not require or warrant acceptance of the taxpayer's sweeping position in the instant case. Further, they point out (pp. 46-47) that several soundly reasoned pre-*Harris* cases, including a decision of this Court (p. 46) "have refused to permit the interposition of a court decree to prevent the imposition of either gift or of estate tax liability." See *Commissioner* v. *Greene, supra* (payments by the estate of an incompetent to the dependent children of the incompetent held to be subject to a gift tax although paid not only pursuant to a court order, but also in discharge of a legal obligation imposed by state law); *City Bank Co.* v. *McGowan*, 323 U.S. 594 (payments directed by a court to be made to dependents of an incompetent held subject to estate taxes as transfers in contemplation of death to the extent that they exceeded the amount reasonably needed for maintenance

and support); and *Hooker* v. *Commissioner,* 10 T.C. 388, affirmed, 174 F. 2d 863 (C.A. 5th) (transfer for the benefit of a minor child made pursuant to a separation agreement and ratified by a divorce decree held subject to gift tax to the extent that the value of the property transferred exceeded the obligation to support the child during minority).

For post-*Harris* decisions reflecting judicial disinclination to extend the doctrine of that case, see e.g., *Rosenthal* v. *Commissioner, supra,* and *Bank of New York* v. *United States,* 115 F. Supp. 375, 383-384 (S.D. N.Y.). In the *Rosenthal* case, the court concluded that certain arrangements made for the taxpayer's children beyond their support during minority evoked a gift tax. It stated (pp. 508-509):

> The rationale of * * * *Harris* * * * rests basically on the divorce court's power, if not duty, to settle property rights as between the parties, * * *. We do not find this rationale applicable to a decree ordering payments to adult offspring of the parties or to minors beyond their needs for support * * *. * * * Awards to children beyond their needs for support during minority have been held enforceable where based upon a contractual agreement between the parties to the divorce. * * * That is the situation here. But since such a decree provision depends for its validity wholly upon the consent of the party to be charged with the obligation and thus cannot be the product of litigation in the divorce court, we do not consider the rationale of the *Harris* decision applicable to the present case. We therefore conclude that the arrangements here made for the

> taxpayer's daughters beyond their support during minority do not obtain exemption from the federal gift tax by simply receiving the court's imprimatur. The similar result reached in *Hooker* v. *C. I. R.,* 5 Cir., 174 F. 2d 863, and *Converse* v. *C. I. R.,* 5 T.C. 1014, affirmed *C. I. R.* v. *Converse* * * * [163 F. 2d 131 (C.A. 2d)], appears to us a correct interpretation of the law and not in conflict with the more recent decision in the *Harris* case.

In the *Bank of New York* case, it was concluded that the proceeds of certain life insurance policies were properly taxed as part of a decedent's estate. It was contended by the executor that under the doctrine of the *Harris* case, the proceeds were excludible because a separation agreement respecting them had been included in a divorce decree and that, consequently, the wife's claim to the policies was founded upon an obligation imposed by law. The court, however, distinguished the case from *Harris* (pp. 383-384) on the ground that whereas in *Harris* the decree was the operative factor, in the case at bar (as in the instant case) the agreement of the parties created their respective rights and at best the court decree merely afforded an additional sanction. Cf. *Chase National Bank of N. Y.* v. *Commissioner,* decided April 28, 1953 (1953 P-H T.C. Memorandum Decisions, par. 53,148), where, upon facts distinguishable from the instant case (p. 443)), the court held that a compromise agreement in settlement of pending litigation, incorporated in a final court decree, did not effect a taxable gift of the property involved.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
MEYER ROTHWACKS,
Special Assistants to the Attorney General.

JULY, 1954.

APPENDIX

INTERNAL REVENUE CODE:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U. S. C. 1952 ed., Sec. 1002.)

Deering, Civil Code of California (1937):

§ 2216. *Voluntary trust, what.* A voluntary trust is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.

§ 2217. *Involuntary trust, what.* An involuntary trust is one which is created by operation of law.

§ 2280. *Revocation of trusts.* Unless expressly

made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. * * *

Treasury Regulations 108, promulgated under the Internal Revenue Code:

Sec. 86.3 [as amended by T. D. 5833, 1951-1 Cum. Bull. 83] *Cessation of Donor's Dominion and Control.*—

(a) *In general.*— * * *

As to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change the disposition thereof, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over the disposition thereof, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

A gift is incomplete in every instance where a donor reserves the power to revest the beneficial title to the property in himself. * * *

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No. 14112

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOIS J. NEWMAN (formerly Lois J. Senderman),
Petitioner.

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

IRELL & MANELLA,
GANG, KOPP & TYRE,
MARTIN GANG,
LOUIS M. BROWN,
NORMAN R. TYRE,
MILTON A. RUDIN,
6400 Sunset Boulevard,
Los Angeles 28, California,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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PETITIONER'S REPLY BRIEF.

Introductory Statement.

Respondent's brief is postulated on the theory that the form of the transaction, and not the substance, is to govern the determination of petitioner's tax liability.

Respondent fails to answer petitioner's contention that all of the evidence, including the written instrument, *prepared and executed by Richard S. Goldman,* compels a finding that petitioner intended to make a completed gift in 1943 and did make a completed gift; that the written instrument confirmed that the gift had been made and petitioner's minor daughter was the owner of 800 shares of Aztec Brewing Company stock. Respondent does not deny the intention to make a completed gift in 1943, but seeks to sustain the Tax Court decision by pointing to the "form" of the transaction in that the written instrument did not contain the word "irrevocable."

However, even assuming the "form" of the written instrument is the only test, respondent has failed to answer

the arguments contained in Point V of petitioner's opening brief that the clear language of the written instrument reveals that it does not create a revocable trust but is simply an acknowledgment by Mr. Goldman that he is holding 800 shares of Aztec Brewing Company stock for Lois E. Senderman, a minor, which minor is declared to be the owner of said 800 shares of stock. [Op. Br. pp. 31-37; R. 38.]

Moreover, there is nothing contained in respondent's brief, either by way of recital of facts or citation of authority, to support respondent's contention that a transfer of assets in 1946 from what respondent contends is a revocable trust to a guardianship, *ipso facto* converted a revocable gift into an irrevocable gift.

Although respondent cannot point to a single donative act (or any other type of act) of petitioner subsequent to 1943, respondent finds no difficulty in contending that petitioner made a taxable gift in 1946.

Summary of the Argument.

1. Petitioner made a gift in 1943 and did nothing subsequent thereto to support a ruling that the completed gift occurred in 1946.

2. Subsequent to 1943, petitioner could not have prevented the transfer of the trust assets to the minor's guardian.

3. If the gift was revocable in 1943, the transfer of the assets from the trustee to the guardian in 1946 did not make the gift irrevocable; accordingly the Court should hold the gift was irrevocable in 1943.

4. Even assuming that the transfer of the trust assets to the guardian in 1946 transmuted a revocable gift to an irrevocable gift, the imposition of a gift tax is foreclosed under the doctrine of *Harris v. Commissioner.*

5. Petitioner made a completed gift in 1943.

I.

Petitioner Made a Gift in 1943 and Did Nothing Subsequent Thereto to Support a Ruling That the Completed Gift Occurred in 1946.

As noted in petitioner's opening brief, the record contains uncontradicted testimony that in 1943 the petitioner made a completed oral gift of 800 shares of Aztec Brewing Company stock to her daughter by orally instructing Mr. Goldman that as to the 2396⅞ths shares of said stock he held in his name as "Trustee," he was to thenceforth hold 800 shares thereof for petitioner's minor daughter. [Op. Br. pp. 4-7; R. 26-27, 125-129, 158-160.]

We submit that this is the only donative act of petitioner to be found in the record.

To confirm that oral transaction, Mr. Goldman prepared and executed a written instrument reciting that petitioner's minor daughter *owned* 800 shares of Aztec Brewing Company stock and that he, Goldman, agreed to hold said stock, and any other property the minor daughter might deposit with him, as "trustee" under certain terms and conditions.[1]

All of the said acts were done in 1943, there is nothing in the record to show any act of petitioner subsequent to 1943 which can be held to be an act of making a gift or completing a gift.

A. The Death of Richard S. Goldman.

Upon the death of Richard S. Goldman in 1946, his son, Richard N. Goldman, was appointed the executor of his estate.

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[1]The nature of that instrument is fully discussed in petitioner's opening brief at pages 7 to 9 and 31 to 37 thereof. However, it is important to note that petitioner did not execute said instrument as "trustor" but executed it "individually" and "as Mother and Guardian of Lois E. Senderman, a minor." [R. 41.]

Petitioner had nothing to do with the death of Mr. Goldman nor with the appointment of his son as his executor. Certainly respondent will not contend that petitioner made an incomplete gift which was to become complete upon the death of Mr. Goldman.

B. The Appointment of a New Trustee.

The written instrument pursuant to which Mr. Goldman agreed to hold the minor's property expressly provided that upon his death, his executors should deliver the minor's property to her duly appointed guardian and if no guardian had been appointed, to apply to a Court of competent jurisdiction for the appointment of a guardian. [R. 39-40.]

Notwithstanding this provision, upon Mr. Goldman's death, his executor petitioned for the appointment of Clarissa Shortall as successor trustee. [R. 28-29, 56-59.][2]

Certainly respondent does not contend this was an act of petitioner which constituted making a taxable gift or completing a gift.

C. Transfer of the Assets to the Minor's Guardian.

Shortly after Clarissa Shortall was appointed successor trustee, *Mr. Goldman's executor* petitioned for the appointment of Miss Shortall as guardian of petitioner's minor daughter in order that the *minor's estate* held pursuant to the written trust instrument executed by Mr. Goldman could be transferred to the minor's guardian as provided in said written instrument. [R. 29, 61-65.]

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[2]Said petition was made in a proceeding designated "In the Matter of the Irrevocable Trust of Lois E. Senderman, Beneficiary, and Lois J. Senderman, Donor and Trustor, and Richard S. Goldman, Trustee." [R. 28, 56.]

Pursuant to said petition the Supreme Court appointed Miss Shortall as the minor's guardian and as such guardian she took possession of the minor's estate.

Respondent fails to explain how this event constituted an act by petitioner in 1946 whereby she completed a gift to her daughter. Just what did petitioner do in 1946 that made this a gift on her part?

To illustrate the lack of merit in respondent's position, we pose the important question:

> What could petitioner have done in 1946 to prevent the transfer of the assets to the minor's guardian?

We submit that there was nothing she could do to prevent such a transfer since she had made a completed gift in 1943. The next section of this brief considers this question in detail.

II.

Subsequent to 1943, Petitioner Could Not Have Prevented the Transfer of the Trust Assets to the Minor's Guardian.

Even adopting respondent's position that the "form" of the written instrument is to govern the determination of the nature of the transaction, it is our position that subsequent to 1943 there was nothing petitioner could have done pursuant to said written instrument to prevent the transfer of the assets to the minor's guardian. Paragraphs (2) and (3) of the written instrument clearly support this contention. [R. 39-40.]

Paragraph (2) of said written instrument provides:

> "(2) Said Trustee agrees to transfer and deliver to any duly appointed Guardian of the estate of Lois

> E. Senderman, a minor, all of the corpus and accumulated income of the trust estate, and in the event that no such Guardian is appointed the Trustee will deliver to Lois E. Senderman upon her reaching the age of 21 years all of the property of said trustee estate then remaining in his hands. If said Lois E. Senderman shall die prior to her reaching the age of 21 years said Trustee undertakes and agrees to deliver to the personal representative of said Lois E. Senderman any portion of the corpus or accumulated income of said trust estate." [R. 39.]

Accordingly, if at any time subsequent to 1943 a guardian were appointed for Lois E. Senderman, Mr. Goldman would have had to transfer all of the minor's property held by him to such guardian. Let us assume that prior to Mr. Goldman's death in 1946 a guardian had been appointed for Lois E. Senderman, Mr. Goldman would have had to transfer the assets to the guardian even though petitioner desired that he continue to act as trustee of the minor's estate. Certainly, the Government would not contend that this would constitute an act of petitioner whereby she made a taxable gift at the time of such transfer.

Similarly, if the petitioner's minor daughter had died subsequent to 1943, Mr. Goldman would have had to deliver to her personal representative the assets held by him pursuant to said written instrument. Would the Government contend that such delivery by Mr. Goldman to the minor's executor constituted a gift by petitioner?

These observations with respect to the effect of paragraph (2) of said written instrument are important, not only with respect to demonstrating that petitioner could not have prevented the transfer of the trust's assets to

the minor's guardian, but as indicative of the fact that in 1943, when the written instrument was executed, Mr. Goldman and petitioner treated the 800 shares of Aztec Brewing Co. stock as being owned by petitioner's daughter.

The same interpretation must be given to paragraph (3) of the written instrument, which provides:

> "(3) The Trustee may resign and discharge himself of the trust created hereunder by causing the property which he holds as Trustee to be transferred into the name of the duly appointed Guardian of said Lois E. Senderman, a minor. In the event of the death of the Trustee while this trust shall remain in force and effect his executors, administrators or heirs at law, as the case may be, are hereby directed and empowered to immediately apply to a court of competent jurisdiction to deliver to the duly appointed guardian of Lois E. Senderman, a minor, that portion of the trust property as to which Lois E. Senderman is the beneficial owner. If no such Guardian has been appointed the executors, administrators or heirs at law of said deceased Trustee shall apply to a Court of competent jurisdiction for the appointment of a Guardian to whom such property can be conveyed." [R. 39-40.]

Pursuant to said paragraph (3), at any time subsequent to 1943, Mr. Goldman could have elected to discharge himself of the trust he had assumed by transferring the minor's property held by him to a duly appointed guardian of the minor. If Mr. Goldman had not died in 1946, but had elected to transfer the assets to the minor's guardian, certainly this act of Mr. Goldman would not have constituted an act of petitioner imposing liability on her for gift tax. Clearly petitioner could not have prevented such resignation and transfer of assets to the minor's guardian.

For the same reason as set forth above, the transfer of the minor's assets to her guardian upon the death of Mr. Goldman did not constitute a gift by petitioner. Pursuant to the terms of the written instrument under which Mr. Goldman held the property for the minor, petitioner could not have prevented such transfer of the assets to the guardian.

Pursuant to the written instrument, the assets held by Mr. Goldman had to be transferred to the guardian of the minor upon the happening of any of the following events:

1. The appointment of a guardian for the minor.
2. The minor's attaining the age of 21 years, in which event the assets were to be transferred to petitioner's daughter.
3. The minor's death prior to attaining the age of 21 years.
4. The resignation of Mr. Goldman as trustee.
5. The death of Mr. Goldman.

Upon the occurrence of any of these events, the property was to be transferred from the trusteeship to the guardianship and petitioner did not reserve any right to prevent such transfer.

It is our position that such transfer would not constitute a change in ownership since at all times since 1943 the minor owned the property involved. The only difference would be that instead of having the property held for her by Mr. Goldman as her trustee, the property would be held by the minor's guardian.

III.

If the Gift Was Revocable in 1943, the Transfer of Assets From the Trustee to the Guardian in 1946 Did Not Make the Gift Irrevocable; Accordingly the Court Should Hold the Gift Was Irrevocable in 1943.

Respondent finds itself in a dilemma. In order to sustain its position, respondent must assert that there was no gift in 1943, but contend that a gift was made by petitioner in 1946. However, respondent cannot point to anything that the petitioner did in 1946 to make a gift.

Neither the Tax Court decision nor respondent's brief herein point to any authority to support the conclusion that the transfer of the assets to the minor's guardianship estate in 1946 *ipso facto* converted a revocable gift into an irrevocable one.

Petitioner and respondent agree that at the end of 1946 the petitioner's minor daughter owned the assets represented by the gift of 800 shares of Aztec Brewing Co. stock in 1943. Respondent says the gift was made in 1946 but cannot support that position by a reference to any facts whereby petitioner made a gift in 1946 or did anything in 1946 to complete her 1943 gift.

The fallacy of respondent's position can be best illustrated by assuming the following facts: In 1943 when petitioner made a gift, she made it subject to a contingency that if her own assets were depleted, she would have the right to revoke the gift. Certainly if Mr. Goldman had taken charge of the property as trustee subject to those conditions and had subsequently died, the stock could have been transferred to the minor's guardian, subject to peti-

tioner's right of revocation. The transfer of the minor's property from the trustee to her guardian would not make a revocable gift an irrevocable gift since the mere transfer to the guardian would not defeat petitioner's right to revoke the gift should her own assets be depleted. Certainly, a minor's guardianship estate can consist of the contingent interest in property; there is no rule of law that a minor's guardanship estate must consist of property in which the minor owns all right, title and interest without any contingency or limitations.

Accordingly, if the gift was revocable in 1943, the mere transfer of the assets to the minor's guardian did not make it irrevocable. However, since the parties to this controversy agree that the minor owns the assets irrevocably at this time, the only conclusion possible is that the minor owned the assets irrevocably from 1943 to the present time.

We submit that the valid decree of the California Probate Court construing the oral trust made in 1943 as irrevocable is binding upon the Tax Court and should be followed by this Court. (See Op. Br. pp. 13-22.)

There is no question but that California law determines whether the gift is revocable or irrevocable. (*Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308 (1934).)

If the Tax Court is to be permitted to disregard the California Court's ruling as to the State law governing this controversy, it should have at least cited some state law upon which it could rely to hold that a revocable gift in 1943 becomes irrevocable merely because a minor's trustee holding the property transfers the property to the minor's duly appointed guardian. The Tax Court decision and respondent's brief completely overlook this problem and simply assume that a revocable gift is *ipso facto* transmuted to an irrevocable gift by the transfer of the property from a trustee holding the property for the minor to the minor's guardian.

IV.

Even Assuming That the Transfer of the Trust Assets to the Guardian in 1946 Transmuted a Revocable Gift to an Irrevocable Gift, the Imposition of a Gift Tax Is Foreclosed Under the Doctrine of Harris v. Commissioner.

In support of its contention that the transfer of the trust assets to the guardian pursuant to a court order does not foreclose imposition of the gift tax under the doctrine of *Harris v. Commissioner of Internal Revenue,* 340 U. S. 106, 71 S. Ct. 181 (1950), respondent argues:

> "Although there was no completed gift here in 1943, the Tax Court nevertheless found that the taxpayer [R. 108] harbored the same donative intent at all times here material, including 1946. Under the terms of the written trust instrument, the death of the original trustee in 1946 required the termination of the trust and the transfer of its corpus to a guardian for the taxpayer's daughter. The concomitance, on May 23, 1946, of donative intent and unconditional transfer of the property to the guardian gave rise to a completed gift, with consequent gift tax liability in that year. Internal Revenue Code, Sections 1000 and 1002 (Appendix, *infra*). *Cf. Latta v. Commissioner,* 212 F. 2d 164 (C. A. 3rd), and *Camp v. Commissioner,* 195 F. 2d 999 (C. A. 1st), involving transfers in trust in which the settlors had retained powers to revoke or revise, dependent upon the agreement of others without adverse interest. It was held that the original transfers did not constitute completed gifts for federal tax purposes, but that gift tax liability was properly evoked in subsequent years upon actual deletion or relinquishment of the powers to amend." (Resp. Br. pp. 24-25.)

We would like to consider this argument in detail:

(1) There Is No Evidence of Donative Intent on May 23, 1946.

There is no evidence to support a finding of donative intent of petitioner subsequent to 1943. Petitioner thought that she had made an irrevocable gift in 1943, and accordingly, there was nothing with respect to which she could have retained a donative intent in 1946. Respondent fails to point to any evidence in the record to support the finding of donative intent in 1946.

Even assuming a donative intent in 1946, the answer to respondent's argument is contained in the second sentence of the above quoted portion of respondent's brief, wherein respondent recognizes that under the terms of the 1943 written instrument, the death of Mr. Goldman in 1946 required the termination of the trust and transfer of its corpus to a guardian of petitioner's daughter.

Accordingly, whether or not petitioner harbored donative intent in 1946 is immaterial, since she could not have successfully prevented a court order transferring the property to the minor's guardian even if she wanted to recapture the property.

(2) There Was No Unconditional Transfer of Property in 1946 Giving Rise to a Completed Gift, With Consequent Gift Tax Liability in That Year.

All that happened in 1946 was that upon the death of Mr. Goldman, all of the minor's right, title and interest in the property held by the minor's trustee was transferred to the minor's guardian. If the interest in the property held by the minor's trustee was a contingent interest, there was nothing in the 1946 Court order to

remove that contingency. There was no act of petitioner transmuting the nature of the 1943 gift.

Respondent is unable to point to any act of petitioner in 1946 which can possibly be construed as a transfer of property to her minor daughter. In brief, petitioner did nothing in 1946 and there wasn't anything she could do to confirm or revoke the 1943 gift even if she had wanted to do something.

(3) Petitioner Did Not Delete or Relinquish Any Powers to Amend or Revoke the Trust.

Respondent cites *Latta v. Commissioner,* 212 F. 2d 164 (C. A. 3), and *Camp v. Commissioner,* 195 F. 2d 999 (C. A. 1st); however, respondent's own statement of what these cases hold demonstrates they are inapplicable to the facts presented herein.

In the *Latta* and *Camp* cases the taxpayers expressly relinquished powers to revise or revoke trusts, which powers were expressly reserved in the original trust.

In this cause, petitioner did not execute the written instrument as "trustor." Moreover, petitioner did not reserve any powers to revoke her 1943 gift or to revise the oral trust or the written instrument which was executed in 1946. Even assuming such reservation of powers to revoke or revise the trust created in 1943 (whether considered an oral trust or written trust), respondent cannot point to any act of petitioner in 1946 which could constitute a relinquishment of those alleged powers.

Respondent's cognizance of the fact that the donative intent of petitioner in 1946 cannot be established com-

pelled respondent to include a footnote in which respondent contends that even in the absence of a specific finding of donative intent in 1946, the gift tax may be predicated on the unconditional transfer of property to the guardian without receipt of full and adequate consideration of money or money's worth. Respondent cites: "*Commissioner v. Wemyss,* 324 U. S. 303, 306-307] *Merrill v. Fahs,* 324 U. S. 308, rehearing denied, 324 U. S. 888; *Farid-Es-Sultaneh v. Commissioner,* 160 F. 2d 812, 816 (C. A. 2d); *Rosenthal v. Commissioner,* 205 F. 2d 505, 509-510 (C. A. 2d); *Commissioner v. Greene,* 119 F. 2d 383, 386 (C. A. 9th), certiorari denied, 314 U. S. 641." [Resp. Br. p. 25, n. 6.]

In each of the cases cited by respondent, there was a transfer of property by the taxpayer during the year for which a gift tax was imposed.

In this cause, respondent seeks to impose gift tax in 1946, a year in which (1) petitioner made no transfer of property; (2) petitioner had no donative intent and (3) petitioner did not relinquish any powers to revoke or revise, even assuming the existence of such powers.

As noted in petitioner's opening brief [Op. Br. pp. 38-40], we do not think this Court has to consider the doctrine of *Harris v. Commissioner,* since the property was irrevocably transferred by petitioner in 1943. However, even assuming the correctness of respondent's position that petitioner made a revocable gift in 1943 and that the Court order in 1946 transferring the assets from the minor's trustee to the minor's guardian *ipso facto* transmuted the revocable gift to an irrevocable gift, it was a transfer pursuant to a Court order and under the *Harris* doctrine it was not subject to gift tax regardless of the adequacy of the consideration.

V.

Petitioner Made a Completed Oral Gift in 1943.

Respondent rests its contention that there was no completed oral gift in 1943 on the fact that the written instrument which was subsequently executed failed to include the word "irrevocable."[3]

However, respondent fails to answer the arguments contained in Points III and V of petitioner's opening brief setting forth that the uncontradicted parol evidence establishes that petitioner made an oral irrevocable gift in 1943 and that the written instrument in 1943 confirmed the fact that the gift by petitioner to her daughter was completed and was drawn accordingly. [Op. Br. pp. 25-26, 31-37.]

No useful purpose would be served by repeating herein the detailed analysis of the written instrument made in petitioner's opening brief to demonstrate that California Civil Code, Section 2280 was not applicable to the written instrument since it was not a declaration of trust by petitioner but a receipt by Mr. Goldman that he held property *owned by petitioner's minor daughter* and his agreement as to the terms and conditions pursuant to which he would

---

[3]Respondent's brief states that it is questionable whether an oral trust could have been created under California law [Resp. Br. pp. 19-20, n. 5]. Any doubt that an oral trust can be created under California law is dispelled by reference to the following dicisions: *Hellman v. McWilliams,* 70 Cal. 449, 11 Pac. 659 (1886); *Woodward v. Metropolitan Life Ins. Co.,* 8 Cal. 2d 361, 65 P. 2d 353 (1937); *Skellenger v. England,* 81 Cal. App. 176, 253 Pac. 191 (1927); and *De Olazabal v. Mix,* 24 Cal. App. 2d 258, 74 P. 2d 787 (1937).

In this connection, it should be noted that at the time petitioner made the oral gift, Mr. Goldman had possession of the stock.

continue to hold that property and any other property said minor might deliver to him. [Op. Br. pp. 33-35.]

Rather than answer the arguments contained at pages 31 to 37 of petitioner's opening brief, respondent chooses to rise above those arguments by insisting that this Court must look to the precise "form" of the written instrument and disregard the "substance" thereof.

We submit if this Court looks to the "substance" of the transaction, it will conclude that in 1943 petitioner intended to and did make a completed gift to her minor daughter of 800 shares of Aztec Brewing Company stock.

Moreover, even if this Court were to limit its consideration to the "form" of the written instrument, it will find that the written instrument expressly confirms the fact that petitioner's gift of the stock to her daughter *had been made,* that the minor owned said stock and petitioner had no right, title or interest therein.

Conclusion.

For the reasons set forth herein and in petitioner's opening brief, we respectfully submit that this Court should reverse thee decision of the Tax Court which imposs a $300,000.00 tax liability upon petitioner for making a $30,000.00 gift in 1943.

Respectfully submitted,

IRELL & MANELLA,
GANG, KOPP & TYRE,
MARTIN GANG,
LOUIS M. BROWN,
NORMAN R. TYRE,
MILTON A. RUDIN,
Attorneys for Petitioner.

No. 14113

United States
Court of Appeals
for the Ninth Circuit

UNITED TRUCK LINES, INC., a Corporation, and OREGON - WASHINGTON TRANSPORT, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Oregon

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-27-53

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

EDWARD REILLEY,
Columbia Building, Seattle, and

GEORGE A. LaBISSONIERE,
Arctic Building, Seattle,
For Oregon Truck Lines;

W. P. ELLIS,
Equitable Building, Portland,
For Oregon-Washington Transport; Appellants.

HENRY L. HESS,
United States Attorney;

VICTOR HARR and
JAMES MORRELL,
Assistants United States Attorney,
United States Court House,
Portland, Oregon;

WILLIAM L. HARRISON,
Attorney for Inter-State Commerce Commission,
1056 Flood Bldg.,
San Francisco, Calif.,
For Appellee.

In the United States District Court
for the District of Oregon

No. C-17,592

UNITED STATES OF AMERICA,
Plaintiff,

vs.

UNITED TRUCK LINES, INC., a Corporation,
and
OREGON-WASHINGTON TRANSPORT, a Corporation,
Defendants.

INFORMATION

(49 USC 306(a)), (18 USC 2), (49 USC 322(a))

The United States Attorney charges:

Count 1

On or about the 2nd day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of iron body valves by motor vehicle on public highways from Spokane, Washington, to the McNary Dam site, Umatilla County, Oregon, for the Hays Manufacturing Company, for compensation in the amount of $18.63, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Com-

merce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 2

On or about the 3rd day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of 50 sacks of lumnite cement by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for the McNary Dam Contractors, for compensation in the amount of $44.18, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 3

On or about the 4th day of January, 1952, in the State and District of Oregon, United Truck Lines,

Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of miscellaneous pipe fittings, valves, and gauges by motor vehicle on public highways from Spokane, Washington, to the McNary Dam site, Umatilla County, Oregon, for the Grinnell Company, for compensation in the amount of $13.89, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 4

On or about the 8th day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of miscellaneous pieces of steel bars by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for the Pacific Machinery and Tool Steel Company, for compensation in the amount of $64.07, without there being in force with respect to defendant a certificate

of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 5

On or about the 17th day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of asphalt felt sheathing and asphalt roofing paper by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for the McNary Dam Contractors, for compensation in the amount of $169.79, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 6

On or about the 18th day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of a miscellaneous assortment of bolts, oilers and wood handles by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for Woodbury & Company, for compensation in the amount of $10.67, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 7

On or about the 21st day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of steel pipe benders by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for Woodbury &

Company, for compensation in the amount of $5.14, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 8

On or about the 23rd day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of iron bolts and steel welding rods by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for Woodbury & Company, for compensation in the amount of $11.89, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 9

On or about the 30th day of January, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of rubber hose by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for Woodbury & Company, for compensation in the amount of $9.02, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Count 10

On or about the 5th day of February, 1952, in the State and District of Oregon, United Truck Lines, Inc., defendant, a corporation, did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle, and as such carrier, did transport a shipment of steel angles by motor vehicle on public highways from Portland, Oregon, to the McNary Dam site, Umatilla County, Oregon, for J. E. Haseltine &

Company, for compensation in the amount of $93.14, without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations. (49 U.S.C. 306(a)).

Oregon-Washington Transport, defendant, a corporation, well knowing the premises aforesaid, did knowingly and wilfully aid and abet said United Truck Lines, Inc., the said offense in the manner and form aforesaid to do and commit. (18 U.S.C. 2).

Dated at Portland, Oregon this 17th day of July, 1952.

HENRY L. HESS,
United States Attorney for the District of Oregon;

/s/ VICTOR E. HARR,
Assistant United States Attorney.

[Endorsed]: Filed July 17, 1952.

[Title of District Court and Cause.]

RECORD OF ARRAIGNMENT AND SETTING FOR TRIAL

October 10, 1952.

Now at this day come the plaintiff by Mr. Maurice V. Engelgau, Assistant United States Attorney, and the defendant Oregon-Washington Transport, a corporation, by Mr. W. P. Ellis, of counsel.

It Is Ordered that Mr. George A. LaBissoniere, be, and is hereby, permitted to appear specially in this cause on behalf of the defendant United Truck Lines, a corporation, pending his general admission to the bar of this court. Thereafter, the said defendants are duly arraigned upon the information herein, and for plea thereto, each of the defendants, above named, through its counsel, states that it is not guilty of the offenses charged in each of the ten counts of the information herein.

Thereafter, each of the defendants, through its counsel, waive trial by jury. Thereupon,

It Is Ordered that this cause be, and is hereby, set for trial before the Court Tuesday, December 9, 1952.

[Title of District Court and Cause.]

STIPULATION OF FACTS

(With Respect to Status of
Umatilla Company Ferry Service).

The parties hereto, by and through their respective counsel, have this 9th day of December, 1952, stipulated and agreed as to factual matters surrounding the operation of a ferry by the Umatilla Ferry, Inc., of Umatilla, Oregon. It is understood that, based upon the within stipulation, the only question presented to the court is to determine the legal status of said ferry.

I.

The issue involved here concerns the status of a ferry plying across the Columbia River between a point in the approximate vicinity of Plymouth (Benton County), Washington, and a point in the approximate vicinity of Umatilla (Umatilla County), Oregon. The ferry company does not hold a license, franchise, or certificate of any kind from any governmental body, agency, or otherwise. It is not regulated in any manner by any Federal, State, County or Municipal agency.

Statement of Facts

II.

The ferry is owned and operated by the Umatilla Ferry, Inc., an Oregon corporation. Its articles of incorporation were filed on January 21, 1948. The articles are herewith set forth verbatim, viz:

Articles of Incorporation of
Umatilla Ferry, Inc.

We, F. J. Stephens, Harry Rodenbaugh and James G. Pearson whose names are hereunto subscribed, do hereby associate ourselves together for the purpose of forming a corporation under and by virtue of the General Laws of the State of Oregon, in force for the formation of private corporations.

Article I.

The name of this corporation shall be Umatilla Ferry, Inc., and its duration shall be perpetual.

Article II.

The object of this corporation, and the business in which it proposes to engage is as follows:

To own and operate a ferry and to do a general ferry business for the purpose of carrying and transporting freight, passengers, baggage, mail and express and to do a general ferry business for hire and for toll; to purchase, construct, own, maintain and operate in connection therewith or otherwise, ferries, vessels, ships, barges, docks, slips and landings and discharging places for freight, and passenger traffic; to purchase, sell, lease, hold and operate all classes of real estate and to construct any and all kinds of improvements thereon or to be used in connection therewith and to purchase, sell, hold, control and operate easements, franchises, roads and rights of way and to construct and build, erect, maintain, lease, sell or otherwise dispose of plants; for the maintenance and repair of motors, machinery mechanical devices of every kind and nature for the furtherance of the purpose herein stated; and to buy and sell all kinds of property, both real and personal, to own, handle and control letters patent and inventions; to borrow money, issue bonds, promissory notes and other evidences of indebtedness; to own, buy, mortgage, hypothecate, pledge, or otherwise deal in and with property of all kinds as well as capital stock and shares of this corporation; and to vote any shares owned by it the same as a natural person might do and to enter into such agreements, contracts and stipulations and make such arrangements as may be or

seem necessary to carry out the same and attain the objects and purposes herein expressed and intended.

The corporation shall possess in addition to the things hereinbefore set forth all the powers necessary to conduct the business or businesses and carry out the objects herein expressed and all those expressly conferred upon corporations by and enumerated in the Oregon statutes, together with all other powers bestowed upon such corporations under any of the laws of the State of Oregon as well as those necessarily implied

Article II-A.

That the termini of such navigation and ferry and the points between such ferry will operate are as follows:

Between a point near the Town of Umatilla in Umatilla County, Oregon, on the banks of the Columbia River which point is described as follows:

Beginning at a point 425 feet East of the "Y" on that certain tract of land situated in Sections 8 and 9, Township 5 North, Range 28 E., W. M., and more particularly described as that island or offshore property which is bounded by elevation line 270 and bearing the symbol "D. S. Willow" on the map prepared by the United States Army Engineers in "February-April, 1935," being Sheet No. 52 of Upper Columbia River, Celilo to Snake River, and at a point on the North side of the present highway running Easterly and Westerly across said tract which point is the point of beginning, thence South 46° 39′ West 60 feet, thence North 39° 44′ West 142.6 feet, thence North 53° 10′ East 60 feet,

thence South 39° 20′ 146.2 feet to the point of beginning.

And a point on the Washington side of said Columbia River in the County of Benton, State of Washington, at or near the Town of Plymouth, described as follows:

That portion of government lot four (4), section eight (8), township five (5) north, range twenty-eight (28) east, W.M., lying south of right of way of Spokane, Portland and Seattle Railway Company.

10½ acre tract to east of and adjoining tract "A" of Second Addition to Town of Plymouth, described as follows:

Beginning at southeast corner of Tract "A"; thence North 695 feet to northeast corner of Tract "A"; thence east and along north line of Tract "A" produced a distance of 696 feet; thence south and parallel with east line of Tract "A" 620 feet more or less to meander line of Columbia River; thence along meander line of river 696 feet more or less to point of beginning, in section 8, township 5 north, range 28 east, W.M.

Article III.

The principal office and place of business of this corporation shall be at the city of Umatilla in the county of Umatilla, and state of Oregon.

Article IV.

The capital stock of this corporation shall be Twenty-five Thousand and no/100 dollars.

Article V.

The capital stock shall be divided into Two Hundred Fifty (250) shares and the par value of each share shall be One Hundred and no/100 dollars.

In Witness Whereof, we have hereunto set our hands and seals this 12th day of January, A. D. 1948.

[Seal] /s/ FRANCIS J. STEPHENS,

[Seal] /s/ HARRY RODENBAUGH,

[Seal] /s/ JAMES G. PEARSON.

State of Oregon,
County of Umatilla—ss.

This Certifies, that on this 12th day of January, A.D. 1948, before me, the undersigned, a notary public in and for said county and state, personally appeared F. J. Stephens, Harry Rodenbaugh and James G. Pearson, known to me to be the identical persons named in and who executed the foregoing articles of incorporation, and acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Testimony Whereof, I have hereunto set my hand and seal, the day and year last above written.

/s/ C. C. PROEBSTEL,
Notary Public for Oregon.

My commission expires 3/4/49.

III.

Pursuant to its articles, the corporation holds, under a de facto arrangement with the Port of Umatilla and Oregon State Land Board, a plot of land extending from the ferry landing to a Umatilla County highway—a distance of some 500 feet. A portion of this land is improved by the ferry company and provides the only means of ingress and egress of vehicular traffic between the ferry landing and the county highway. Likewise, the ferry company holds a lease to lands on the Washington side extending from the ferry landing to a county highway—a distance of some 1500 feet. A portion of this land is improved and maintained by the ferry company for vehicular traffic.

IV.

Washington State Highways 8 and 8E traverse the Washington side of the river to and north of Plymouth. On the Oregon side U. S. Highway 730 traverses the town of Umatilla. The Umatilla county highway connects with U. S. No. 730 and extends toward and passes within 500 feet of the Columbia River.

V.

The ferry company has posted signs in both Oregon, on U. S. Highway No. 730, and in Washington, on Highways 8 and 8E, all visible to the travelling public, denoting as follows:

(On the Oregon side)
Umatilla Ferry
All Points
North-West
Umatilla Ferry

Short Route to Spokane—¼ Mi.
11 Miles
Umatilla Ferry
Short Cut
Spokane
Via Pasco
16 Miles
Umatilla Ferry
Short Cut
North-East

(On the Washington side)
Ferry
U. S. No. 30
Pendleton
[Arrow point to right]
Umatilla Ferry
[Arrow point to right]
Umatilla, Oregon

(At landing slip on Oregon side)
Please Stop Here
24 Hrs.
Service

The Oregon State Highway Commission has posted the following directional markers:

1.

Richland
Plymouth
Umatilla Ferry
Toll Ferry

2.

Umatilla Ferry
Junction Ahead

VI.

During the month of January, 1952, the ferry transported 5,522 one-way crossings of passenger cars, and 300 one-way crossings of trucks. During the month of October, 1952, it transported 10,034 one-way crossings of passenger cars, and 550 one-way crossings of trucks.

VII.

The ferry company charges a uniform toll in an amount of $1.00 per passenger car, and a uniform fee for trucks based upon the number of axles.

VIII.

The ferry company pays a transportation tax to the United States Treasury Department. For the month of January, 1952, the tax amounted to $119.68. For the month of October, 1952, the tax amounted to $240.32.

IX.

As far as pertinent here, United Truck Lines, Inc. (hereinafter called United) is authorized by the Interstate Commerce Commission to serve all points in Benton County, Washington. It is not specifically authorized by its certificate to serve any point in Umatilla County, Oregon, nor any part of

the McNary Dam site reservation in Oregon, part of which lies in Umatilla County.

The Commission has recognized that a carrier may serve areas beyond an authorized point if only private ways are used in the beyond operation, but the private way must be entered from an authorized point or area.

X.

United, by permission of the ferry company and Bonneville Power Administration, constructed its own roadway extending from the ferry landing (on the Oregon side) eastward along the Columbia River to the damsite reservation—a distance of some 1,000 feet.

XI.

One or more of the shipments described in the information herein moved via the ferry and over the private roadway here described to a point in the McNary damsite in Oregon.

.....

U. S. Attorney;

/s/ VICTOR E. HARR,
Assistant U. S. Attorney;

/s/ WILLIAM L. HARRISON,
Atty., Interstate Commerce Commission, Attorneys for Plaintiff.

/s/ EDWARD REILLEY,

/s/ GEORGE R. LaBISSONIERE,

/s/ WM. P. ELLIS,
Attorneys for Defendants.

[Endorsed]: Filed December 9, 1952.

[Title of District Court and Cause.]

ORAL OPINION

January 26, 1953.

An Information was filed against the defendants containing 10 counts, and in each count it is charged that the defendants knowingly and wilfully engaged in interstate operation on a public highway as a common carrier by motor vehicle in violation of § 306(a) Title 49 U.S.C. Each of the defendants has filed a motion to dismiss. It is admitted that the defendant, United Truck Lines, is a certified carrier in the State of Washington, but is not certified in the State of Oregon. The shipments here in controversy were transported by the defendant, United Truck Lines, over the public highway in the State of Washington and a two-way ferry, which crosses the Columbia River, between a point near Plymouth, Washington, and Umatilla, Oregon. Upon arriving on the Oregon side of the Columbia River, the trucks used a private road for the balance of the trip.

The issue involved in this case depends upon the status of the ferry crossing the Columbia River. The parties have entered into a stipulation in which the facts surrounding the ownership and operation of the ferry were agreed upon. I have considered the authorities submitted by both parties in the light of such stipulation and I find that, even though

the ferry operates without a franchise and operates from approaches on both the Oregon and Washington sides of the Columbia, which are on private property, the ferry is a public highway within the meaning and intent of § 206(a), Part II of the Interstate Commerce Act.

The motions to dismiss are therefore denied.

[Title of District Court and Cause.]

ORDER

January 26, 1953.

Now at this day the Court renders its opinion herein.

It Is Ordered that the motion for dismissal of this cause be, and is hereby, denied.

[Title of District Court and Cause.]

ORAL OPINION

August 28, 1953.

An information containing 10 counts was filed against the defendants. In each count it is alleged that United Truck Lines, Inc., did knowingly and wilfully engage in an interstate operation on a public highway as a common carrier by motor vehicle in violation of § 306(a) Title 49 United States Code. Each count further alleged that the defendant Oregon-Washington Transport did knowingly and wilfully aid and abet defendant United Truck Lines, Inc.

On January 26, 1953, I denied the motions made by both defendants to dismiss the information and held that the ferry used by the defendants in crossing the Columbia River was a public highway within the meaning and intent of § 306(a) of the Interstate Commerce Act.

The certificate of defendant United authorizes it to serve the State of Washington upon those routes

which parallel the Columbia River. It is also authorized to serve the City of Portland, Oregon.

The shipments, which formed the basis of most of the counts in the information, commenced at Portland and were transported across the Columbia River to Vancouver, Washington; then up the Washington side of the Columbia River to Plymouth at which point a ferry was utilized to recross the Columbia River. The ferry on the Oregon side docked on property of the United States Government, namely, Umatilla Island, and United's trucks proceeded from that point via a private road to the point of destination, the McNary dam site, which is also on Government property.

At the trial the defendants made three contentions:

First, that the defendants at no time, after leaving the Washington shore, operated upon an area over which the Commission had jurisdiction because the Government reservation extends to the border of the State of Washington and not merely to the Oregon shore of the Columbia River.

Second, that, even if the court finds that the Government reservation extends only to the Oregon shore of the Columbia River, the transportation by the defendants after leaving the Washington shore is not subject to the jurisdiction of the Commission because the point at which the ferry docked was United States' property and defendant proceeded directly therefrom to the dam site by use of a private road.

Third, that, even if such transportation were of an interstate character, the defendant United did not continue to carry the freight shipment beyond its certificated jurisdiction for the reason that trucks so used were being operated by the Oregon-Washington Transport, Inc., from Plymouth, Washington, to the dam site under the latter's certificate.

At the conclusion of the trial, I indicated that the alleged lease agreement between the defendants, by which Oregon-Washington Transport, Inc., is alleged to have completed the carriage of goods from Plymouth, Washington, to the dam site, was merely a paper transaction and not a bona fide lease. After having considered the evidence at the trial, I am firmly convinced of that fact, and I now so hold.

The remaining question is whether the defendant, in crossing the Columbia River by a ferry which docks on Umatilla Island and by proceeding from that point to the dam site by way of a private road, violates section 306 of the Act.

In my view, it is immaterial whether the Columbia River at such point was:

(1) wholly within a Government reservation, or

(2) partially within the territorial boundaries of the State of Washington and partially within a Government reservation, or

(3) partially within the territorial boundaries of the State of Oregon,

for the reason that I have previously found that the ferry, crossing at such point and used by the

defendant United, was a public ferry and therefore a public highway.

Section 306(a) prohibits the operation of a motor carrier without authority on "any public highway or within any reservation under the exclusive jurisdiction of the United States."

Therefore defendants are subject to the jurisdiction of the Commission and must be certificated whether the public highway is deemed to cross Oregon territory or a Federal reservation.

[Title of District Court and Cause.]

TRANSCRIPT OF FINDINGS AND JUDGMENT

May 28, 1953.

Now at this day come the plaintiff by Mr. James Morrell, Assistant United States Attorney, and Interstate Commerce Commission by Mr. William Harrison, of counsel, and the defendant United Truck Lines by Mr. Edward Reilley and Mr. George LaBissoniere, of counsel, and Oregon-Washington Transport by Mr. William Ellis, of counsel. Whereupon, this cause comes on for trial before the Court, and the Court having heard the evidence adduced, at the close of plaintiff's case, plaintiff having rested, defendant moves the Court for judgment of acquittal, and the Court having heard the statements of counsel,

It Is Ordered that said motion be, and is hereby, denied.

Thereafter, the Court having heard the statements of counsel, will advise thereof.

It Is Ordered that the respective parties hereto file their briefs by June 15, 1953.

District Court of the United States
District of Oregon

No. C-17,592

UNITED STATES,

vs.

UNITED TRUCK LINES, Incorporated, a Corporation, and OREGON - WASHINGTON TRANSPORT, a Corporation.

JUDGMENT AND COMMITMENT

Criminal Information in Ten Counts for Violation of U.S.C., Title 49, Secs. 306(a) 322(a).

On this 28th day of August, 1953, came James W. Morrell, Assistant United States Attorney, and the defendant United Truck Lines, incorporated, appearing by George R. LaBissoniere, of counsel;

The defendant having been convicted on the finding and judgment of the Court of Guilty of the offenses charged in the information in the above-entitled cause, to wit: knowingly and wilfully engaging in an interstate operation on a public highway as a common carrier by motor vehicle in violation of Sec. 306(a), Title 49, USC, as charged in Counts One to Ten, inclusive, and the defendant

having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, do pay a fine of Fifty Dollars on each of Counts One to Ten, inclusive, or a total fine of Five Hundred Dollars.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed August 28, 1953.

District Court of the United States
District of Oregon

No. C-17,592

UNITED STATES,

vs.

UNITED TRUCK LINES, Incorporated, a Corporation, and OREGON - WASHINGTON TRANSPORT, a Corporation.

JUDGMENT AND COMMITMENT

Criminal Information in Ten Counts for Violation of U.S.C., Title 18, Sec. 2.

On this 28th day of August, 1953, came James W. Morrell, Assistant United States Attorney, and the defendant Oregon-Washington Transport, appearing by William P. Ellis, of counsel.

The defendant having been convicted on the finding and judgment of the Court of Guilty of the offenses charged in the information in the above-entitled cause, to wit: knowingly and wilfully aiding and abetting the United Truck Lines to violate Sec. 306(a), Title 49, United States Code, as charged in Counts One to Ten, inclusive, and the defendant having been now asked whether it has anything to say why judgment should not be pronounced against it, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, do pay a fine of Ten Dollars on each of Counts One to Ten, inclusive, or a total fine of One Hundred Dollars.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed August 28, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Clerk of the District Court:

Comes Now, United Truck Lines, Inc., East 915 Springfield Avenue, Spokane, Washington, through its attorney, George R. LaBissioniere, and Oregon-Washington Transport, Inc., 1231 N. W. Hoyt, Portland, Oregon, through its attorney, William P. Ellis, and hereby appeals from the judgment of the

honorable Gus J. Solomon, entered in the above-entitled cause on August 28, 1953.

Defendant, United Truck Lines, Inc., was charged in an information contained in ten counts with knowingly and wilfully engaging in an Interstate operation on a public highway, as a common carrier by motor vehicle, in violation of Section 306(a), Title 49 of the United States Code. Defendant, Oregon-Washington Transport, Inc., was charged in each of the same ten counts with knowingly and wilfully aiding and abetting defendant, United Truck Lines, Inc.

The judgment of August 28, 1953, found the defendants guilty on each of the ten counts charged in the information, and imposed a fine of $50 for each count on the defendant, United Truck Lines, Inc., and $10 for each count on the defendant, Oregon-Washington Transport, Inc.

The principle contention of the defendants at the trial was that the transportation performed was not subject to the jurisdiction of the Interstate Commerce Act, because it was not performed entirely over a private ferry and therefore could not be a public highway within the meaning of Section 306 (a), Title 49, of the United States Code.

However, Honorable Gus J. Solomon, in his oral opinion found that the above-mentioned ferry was a public ferry and therefore a public highway, hence constituting transportation over a public highway within the meaning of 306(a), Title 49 of the United States Code.

The above-entitled defendants hereby appeal from each and every ruling, order or finding contained in said judgment.

/s/ GEORGE R. LaBISSONIERE,
Attorney for Defendant,
United Truck Lines, Inc.

/s/ WILLIAM P. ELLIS,
Attorney for Defendant, Oregon-Washington Transport, Inc.

[Endorsed]: Filed September 4, 1953. U.S.D.C.

[Endorsed]: Filed September 10, 1953. U.S.C.A.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk, United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of information, record of arraignment and setting for trial, stipulation of facts, order denying motion for dismissal, record of trial before the court, judgment and sentence of United Truck Lines, judgment and sentence of Oregon-Washington Transport, bond on appeal, designation of record on appeal, statement of points, stipulation to extend time to file record, order extending time to file record on appeal, and this certificate, constitute the record on appeal from

the judgments and sentences in a cause therein numbered C-17,592, in which the United States of America is Plaintiff and Appellee, and the United Truck Lines, Inc., a corporation, and Oregon-Washington Transport, a corporation, are defendants and appellants; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellants, and in accordance with the rules of this court.

I further certify that there is enclosed herewith a copy of the court's oral opinion of August 28, 1953, which is not filed in this case.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellants.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 31st day of October, 1953.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14113. United States Court of Appeal for the Ninth Circuit. United Truck Lines, Inc., a corporation, and Oreon-Washington Transport, a corporation, Appellant, vs. United States of America, Appellee. Transport of Record. Appeal from the United States District Court for the District of Oregon.

Filed November 2, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14,113

UNITED TRUCK LINES, INC., et al.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellees.

STATEMENT OF POINTS

The points upon which appellant will rely on appeal are:

1. The trial court was in error in holding that the operation from the Washington boundary at the middle of the Columbia River to the Umatilla Island Government Reservation on the Oregon shore was conducted over a public highway within the meaning of Section 206(a) of the Interstate Commerce Act.

/s/ GEORGE R. LaBISSONIERE,
Attorney for Appellant.

[Endorsed]: Filed November 12, 1953.

No. 14113

In the
United States Court of Appeals
For the Ninth Circuit

UNITED TRUCK LINES, INC., a Corporation, and OREGON-WASHINGTON TRANSPORT, a Corporation, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANTS

GEORGE R. LABISSONIERE,
10520 20th Ave. N. E., Seattle 55, Wash.,

WILLIAM P. ELLIS,
1102 Equitable Bldg., Portland, Oregon,
Attorneys for Appellants.

THE ARGUS PRESS, SEATTLE

No. 14113

In the
United States Court of Appeals
For the Ninth Circuit

UNITED TRUCK LINES, INC., a Corporation, and OREGON-WASHINGTON TRANSPORT, a Corporation, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

BRIEF OF APPELLANTS

GEORGE R. LABISSONIERE,
10520 20th Ave. N. E., Seattle 55, Wash.,

WILLIAM P. ELLIS,
1102 Equitable Bldg., Portland, Oregon,
Attorneys for Appellants.

THE ARGUS PRESS, SEATTLE

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In the

United States Court of Appeals

For the Ninth Circuit

United Truck Lines, Inc., a Corporation, and Oregon-Washington Transport, a Corporation, *Appellants,* vs. United States of America, *Appellee.*	No. 14113

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the District of Oregon finding the defendant-appellant, United Truck Lines, Inc., guilty upon ten counts in a Criminal Information for violation of U.S.C., Title 49 Secs. 306 (a) and 322 (a). It was claimed that the District Court had jurisdiction under Sec. 306 (a), Title 49, U.S.C., which reads in part as follows:

> "(1) Except as otherwise provided in this section and in section 310 (a) of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of

the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *."

And under Sec. 322 (a), Title 49, U.S.C., which reads:

"(a) Any person knowingly and willfully violating any provision of this part, or any rule, regulation, requirement, or order thereunder, or any term or condition of any certificate, permit, or license, for which a penalty is not otherwise herein provided, shall, upon conviction thereof, be fined not more than $100 for the first offense and not more than $500 for any subsequent offense. Each day of such violation shall constitute a separate offense."

Jurisdiction was claimed over defendant-appellant Oregon-Washington Transport, Inc., upon the ground that it knowingly and willfully aided and abetted said United Truck Lines, Inc., in the aforesaid offense in violation of U.S.C., Title 18, Sec. 2.

Jurisdiction in this Honorable Court to review the judgment of the District Court is provided under Sec. 1291, Chap. 83, Title 28, U.S.C., which reads as follows:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On July 17, 1952, the United States Government, through the United States Attorney, filed a Criminal Information charging in ten counts that United Truck Lines, Inc., hereinafter referred to as appellant, did knowingly and willfully engage in an interstate operation on public highways as a common carrier by motor vehicle, and as such carrier, did transport various shipments on the days mentioned, from Portland, Oregon, or Spokane, Washington, to the McNary Dam site, Umatilla County, Oregon, for compensation without there being in force with respect to defendant a certificate of public convenience and necessity issued by the Interstate Commerce Commission authorizing such interstate operations as required by Sec. 306 (a), Title 49, U.S.C. Oregon-Washington was charged with aiding and abetting in said offense (R. 3 to 10).

Thereafter, on October 10, 1952, the said defendants (appellants) were duly arraigned upon the information and each entered a plea of not guilty of the offenses charged in each of the ten counts of the information.

At that time, the appellants announced that they intended to file a Motion to Dismiss upon the grounds that the District Court did not have jurisdiction of the cause for the reason that the appellants were not engaging in an interstate operation on public highways in Oregon but were in fact upon a private highway. The District Court requested the defendants and plaintiff to confer in an attempt to arrive at a stipulation of facts upon which the Court could determine the issue of jurisdiction. After several conferences, it was agreed

that the issue to be determined by the Motion to Dismiss depended upon the legal status of a ferry operated by the Umatilla Ferry, Inc. Accordingly, a Stipulation of Facts was agreed upon and filed December 9, 1952, which appears at pages 11 to 20, inclusive, of the Transcript of Record.

As stated in the Stipulation of Facts, appellant United Truck Lines, has certificated authority to operate over the public highways as a common carrier from Spokane, Washington, or Portland, Oregon, to all points and places in Benton County, Washington. The boundary of Benton County extends to the middle of the Columbia River which is the boundary line of the State of Washington. Umatilla County, Oregon, the terminus of the operation alleged to have been conducted, lies directly across the river from Benton County. The McNary Dam site, the specific destination of the alleged operation in Umatilla County, Oregon, is situated on the McNary Dam Reservation which is a federal reservation, lying on both the Oregon and Washington sides of the Columbia River.

Appellant United served the Washington side of the McNary Dam project as a motor carrier until the center of construction activities shifted to the Oregon side of the river. In order to be able to continue to serve the Oregon side of the project, it became necessary to utilize a ferry operating across the Columbia River between a point in the approximate vicinity of Plymouth (Benton County), Washington, and a point on a government-owned island (Umatilla Island) on the Oregon side. In order to continue to stay on private roads in

Oregon, Appellant United, by permission of the federal government, constructed its own roadway extending from the ferry landing on the beach eastward on the reservation property to the construction site of the dam —a distance of some 1,000 feet (R. 20).

As is stated on page 20 of the Transcript of Record (Stipulation of Facts), the Commission has always recognized that a carrier may serve a territory or areas not authorized in its certificate if only private roads are used in the beyond operation. Therefore, the operation by Appellant United was perfectly lawful upon the private roadway it had constructed on the Oregon side, providing it had not traversed a public highway before reaching the private road.

Therefore, the single offense alleged was that appellant United had operated on a public highway from the middle of the Columbia River to the shore on the Oregon side while it was actually on the ferry.

It was further stipulated that the ferry is not a connecting link or continuation of the highway system of either Washington or Oregon nor does it hold a license, franchise, or certificate of any kind from any governmental body, agency, or otherwise (R. 17, 12).

Based primarily upon these two facts, which the court affirmatively found in its opinion (R. 20 b), appellants maintained that this ferry could not be a public ferry therefore, it was not a public highway. Despite the existence of these two factors, the District Court in its opinion of January 26, 1953, denied the motion for dismissal.

Thereafter, a trial was held on May 28, 1953, as to the

merits of the offense charged which resulted in a finding of guilty by the Court for the reasons stated in its Oral Opinion of August 28, 1953. On August 28, 1953, Judgment and Commitment was pronounced from which a Notice of Appeal was filed September 4, 1953, setting out that appellants appealed only from the ruling of the District Court that the ferry is a public highway within the meaning and intent of Sec. 306 (a), Title 49, U.S.C.

SPECIFICATION OF ERROR

1. The trial court was in error in holding that the operation from the Washington boundary at the middle of the Columbia River to the Umatilla Island Government Reservation on the Oregon shore was conducted over a public highway within the meaning of Section 206 (a) of the Interstate Commerce Act.

ARGUMENT FOR APPELLANTS

The foregoing Specification of Error had its inception in three erroneous holdings by the trial court:

1. In holding that a "ferry" is a "highway."
2. In holding that this ferry was a "public" highway.
3. In holding that appellants were engaging in an "interstate operation" on the ferry.

Before proceeding to a discussion of the three foregoing premises upon which the order under review is based, it must clearly be established that the issue facing the trial court was primarily based upon a construction or interpretation of a statute. Perhaps here

lies the most cardinal error of the trial court in that it applied a liberal construction to a statute that was penal in nature.

The information, as stated before, charges the defendants with knowingly and willfully engaging in an interstate operation on a public highway as a common carrier by motor vehicle in violation of Section 306 (a), Title 49, U.S.C., set forth above. Section 322 (a), Title 49, U.S.C., set out above, makes it a federal crime for any person to knowingly and willfully violate any provision of the Motor Carrier Act. Therefore, these two sections, when read together, are penal in nature. It is well settled in this court that penal and criminal statutes are to be strictly construed. Acts imposing forfeitures or penalties are always strictly construed as against the government and liberally as to the defendants and the courts may not search for an intention or inclusion not suggested by the plain words of a penal statute. *Fasulo v. U. S.,* 47 S.Ct. 200, 272 U.S. 620, 71 L.ed. 443; *Greely v. Thompson,* 51 U.S. 225, 10 How. 225, 13 L.ed. 397. This rule applies with equal force to the Interstate Commerce Act even though it is both remedial and penal in nature, for it is possible to apply a liberal construction to its remedial portions and a strict interpretation to its penal provisions. The case of *U. S. v. Fruit Growers Exp. Co.,* 279 U.S. 363, 49 S.Ct. 374, 73 L.ed. 739, involved a review of an indictment against a railroad for misreporting or falsifying records required to be kept pursuant to Part I of the Interstate Commerce Act under penal liability of Section 10 (1), Title 49, U.S.C. (which is practically identical to Section 322 (a) *supra*). The Supreme Court af-

firmed the judgment in favor of the defendant railroad and held that the provisions of the Act imposing a penalty of fine or imprisonment are to be given a "reasonably strict construction" to effect the particular purpose Congress had in mind.

Hence, it may be adopted as the law of this case, that construction of a statute imposing criminal penalties, such as the one of which violation is here charged, is subject to a reasonably strict interpretation. By this, we do not mean that the words must be strained or distorted in order to exclude their plain meaning or legislative intent. But, by the same token, the coverage of the words cannot be supplied by implication or liberally construed in favor of the plaintiff. *U. S. v. Peoples,* 50 F.Supp. 462; *Fleming v. Fir-Tex Sales Corp.,* 69 F. Supp. 902.

The purpose of the construction indulged in by the trial court was not to effect a broad public purpose in aid of obvious congressional intent in a civil proceeding, but purely to bring the appellants within its implications for purposes of penal sanction. As will be seen in the following discussion relative to a construction of the statute under review, inclusion of a "ferry" under the words "public highway" could only be achieved by a liberal and unrealistic construction fully at odds with well settled legal definitions of the terms.

The general rule is laid down in 37 Am. Jur. Motor Carriers, Sec. 24, that "the Commission should not assume jurisdiction over motor transportation unless it clearly appears by the language of the statute that it has such jurisdiction." A Commission only derives its

power to act from the legislative authority conferred upon it and has only express powers and those implied powers absolutely necessary to carry out the express. No authority will be implied in a matter involving jurisdiction.

Having determined that a statute imposing penal sanctions is subject to a reasonably strict construction, let us now turn to a construction of the particular statute under which this proceeding was instituted.

This Ferry Is Not a Highway

The Stipulation of Facts beginning on page 11 of the Transcript of Record establishes that this "boat" is a "ferry."

Webster defines a ferry in its physical sense as a "place of crossing or a place or passage where persons or things are carried across a river in a boat." "A vessel used in ferry service; a ferry boat."

Bouvier defines a ferry to be a place where persons and things are taken across a river or stream in boats or other vessels for hire.

Hence, we see that a ferry is passage over water by boat. There cannot be a ferry without some kind of boat or vessel in which men or things are carried. Therefore, it is a physically different thing than a highway.

A "highway," according to the most commonly accepted definitions is a way open to the public at large, for travel or transportation, without distinction, discrimination, or restriction. Its prime essentials are the

right of common enjoyment on the one hand, and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway.

The term "highway" is generic and includes all public roads in any ordinary mode or by any ordinary means which the public has a right to use either conditionally or unconditionally. In its broad or general sense, it may include turnpikes, toll roads, bridges, canals, and navigable waters and when appearing in a general law, it will ordinarily be regarded as having been used by the legislature in its general sense. Its meaning, however, may be limited to its strict sense by the subject matter of the statute in which it is employed. 25 Am. Jur., Highways, Section 5. For example, in its broad and general sense a highway includes canals and navigable water. Yet, no one would suppose that a state law requiring payment of a license fee based upon gross weight for use of the state highways would apply to barges plying the navigable waters of the state.

A "highway" is defined in Part II of the Interstate Commerce Act, as used in Sec. 306 (a), in Section 303, Title 49, U.S.C., as follows:

> "The term 'highway' means the roads, highways, streets and ways in any state."

Can a ferry in its physical sense come within these express inclusions?

Obviously, this boat or vessel is not a "road" or a "street" under any definition because it is a physically different thing.

It further cannot be a "highway" because it is clear

that Congress by including the word "highway" under a description of the very word it was defining, had reference to legally created and maintained state highways as that word is used in its ordinary sense.

It also must be assumed that by reading the description as a whole, the inclusion of the word "ways" was intended to be a more detailed description of passages, paths, alleys or other approaches over land. The reason for this is that the Congress in each of its prior descriptions referred to a passage over land so there is no logical reason to assume that inclusion of the word "ways" was intended to suddenly take in a whole class of other passages such as canals, ditches, lakes, lagoons, etc., in an act that was dealing *only* with land-borne motor carrier operations. It is fundamental that where the legislature has undertaken to describe particularly what is to be included in a statutory definition other inclusions must not be implied into the definitive text.

It is also obvious that Congress meant to include as highways only those legally recognized and maintained as such in each state because the particular section under construction defines a "highway" as the highways, streets and ways *"in any state."* The State of Oregon, through its legislature, has specifically defined the term "Highway" under Section 336.005 of the Oregon Revised Statutes to mean:

> " 'State Highway' means any road or highway designated as such by law or by the State Highway Commission pursuant to law and includes both primary and secondary highways."

And in Section 366.010:

> "(2) 'Road' or 'highway' includes necessary

bridges and culverts, and city streets, subject to such restrictions and limitations as are provided."

It will be seen that the Oregon Code includes only "roads or highways" when designated as such by law, or by the State Highway Commission pursuant to law, and intentionally limits "roads" or "highways" to land ways including only necessary bridges, culverts and city streets. It does not include canals; waterways, navigable or non-navigable; ferries or toll roads or other ways. Since ferries are not highways in Oregon, and the statute makes the definition dependent upon recognized highways "in any state" this ferry was not a highway in Oregon.

The weight of authority in Oregon, Washington, and in all state or federal jurisdictions that have specifically passed upon the point is that a ferry, as a boat or a vessel, of and by itself, is not a highway in its legal sense. The best case dealing with the subject to illustrate this premise is the leading case of *Menzel Estate Co. v. City of Redding,* 178 Cal. 475, 174 Pac. 48. In this case, the California Supreme Court held that a ferry itself is not a public highway even though the place where it is used may be one in a literal sense. The following language delineates this basic distinction:

"But a ferry is not in a strict technical sense, under our law, a highway * * *.

"And there is no authority in this state that I have been able to find where a *ferry and ferry franchise becomes or could become a public highway,* and the weight of authority in other states holds *only* that a ferry is a connecting link between two public highways. * * * " (Italics ours)

Another leading case pointing out the distinction is *Chick v. Newberry and Union County,* 27 S.C. 419, 3 S.E. 787, in which a cause of action brought under a statute authorizing damages for defects in any "highway, causeway or bridge" was held not to include a ferry. In construing the word "highway," the court said:

> "But the question here is one of construction—in what sense did the legislature use the word 'highway'? As indicated in the definition given above, the ordinary meaning of the word 'highway' is a passage on land. A bridge spannning the water, and connecting the banks, would seem nearer to being a 'highway' than a ferryboat; and, as it was deemed proper or necessary to express the case of a 'bridge' it would seem to be a strained construction that it was unnecessary to mention a 'flat-boat' or ferry, for the reason that it was already included in the word 'highway.'

The Washington Supreme Court has repeatedly held that ferries and ferry premises including approaches are not highways or parts of highways. Among the decisions which most clearly express the foregoing rule is the case of *Norton v. Anderson,* 164 Wash. 55, 2 P. (2d) 266. In that case the plaintiff was injured on a ramp or approach leading to a ferry which was owned by King County (one of the defendants) and operated for the County by Anderson (the other defendant). The County contended that it was not under the legal duty that a ferry operator normally bears, because according to the County's contention the ramp was a part of the public street or highway. The Supreme Court dis-

posed of the County's argument in the following words (164 Wash. 61):

> " * * * The ferry-landing approach upon which the respondent was injured is, we must assume, a reasonably necessary adjunct to the ferry system. It belongs to the county as a part of that system, and is not a part of an ordinary highway or street. *Anderson Steamboat Co. v. King County,* 84 Wash. 375, 146 Pac. 855. See, also, *Hart v. King County,* 104 Wash. 485, 177 Pac. 344."

In the case of *Corbaley v. Pierce County,* 192 Wash. 688, 74 P.(2d) 993 (which was also a personal injury case upon a wharf which was used by Pierce County in connection with ferry operations), the court said at 192 Wash., page 698:

> "It is prejudicial error for the trial court to instruct the jury that the wharf involved was a public highway. *Gregg v. King County, supra; State ex rel. Wauconda Inv. Co. v. Superior Court,* 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E, 1076."

In the state of Oregon, we have seen that the legislature has specifically defined what is to be included under the term highways. There are no Oregon cases which hold a ferry to be a highway *per se.* Cases that have dealt with the subject have only held that in a literal sense a ferry is a continuation of a highway when it is a necessary connecting link between two highways. The early case of *Mills v. Learn* (1852) 2 Ore. 215, points out that ferries are highways in a literal sense only when they are a necessary continuation of a highway in the following language:

> "After a full examination of the authorities, we re-affirm the conclusions then made, that when a

public highway crosses a stream of water, it is not interrupted, but the water and soil beneath it, within the limits of the road, are a continuous part of the road, *that when necessary* for the proper use and enjoyment of the highway by the public, the ferries and bridges are also parts and parcels of the road." (Italics ours)

Right at this point, the basic and fundamental distinction between the cases that hold a public ferry to be a public highway and those that hold a ferry not to be a highway *per se* must be noted.

This is, that in those cases so holding the ferry was admittedly a direct, necessary, and continuous link in a state highway system and also the status of the boat itself was not in issue.

A careful review of all state and federal decisions clearly establishes that the question of whether or not a "ferry" can be a "highway" depends first of all, whether or not it is maintained and established as a continuation of, or necessary link in, a highway. The concept that a ferry is a highway when it is an actual continuation of a public highway has been applied only where it has made connections with public thoroughfares at each terminus.

The leading authority in this jurisdiction for this proposition is *United States v. Canadian Pac. Ry.,* 4 F.Supp. 851, in which the issue of the legal status of certain boats as vessels or ferries was directly in issue. In this case the defendant operated daily service in steamer type vessels which also carried automobiles as incidental to its passenger service between Seattle and Victoria or Vancouver, B. C. The defendant had no li-

cense or franchise to operate a ferry line. The court found that the defendant's boats were not international ferries based upon three concurrent tests. One, the conventional sea-going construction of the vessels; two, the character of the service provided in that it did not furnish a connecting link for highway traffic; three, the absence of compliance or attempt to comply with local ferry laws.

In passing upon the second factor, the court said:

> "Nor does the service furnish a connecting link for highway traffic. Of course, highways emanate from each city terminus of the steamship line where ships berth at the ocean docks. A ferry may be said to be a necessary service by specially constructed boat to carry passengers and property across rivers or bodies of water from a place on one shore to a point conveniently opposite on the other shore and *in continuation of a highway making connections with a thoroughfare at each terminus.* Anciently, a ferry performed the same service of carrying people and cargo across a river, small lagoon, or narrow lake as the water craft was later, and is, carried by bridge structure above the water. This service was extended to larger lakes and other larger bodies of water in extension of, or forming a connecting link to, highways." (Italics ours)

The common law concept of a ferry was very early recognized by the Supreme Court of the United States in *Conway v. Taylor,* 1 Black 629, 17 L.ed. 201, wherein the court quoted with approval the following principle:

> "A ferry is in respect of the *landing place, and not of the water.* The water may be to one, and the ferry to another." (Italics own)

The foregoing case involved the right of the state of Kentucky to grant an exclusive ferry franchise, which right was upheld under the principle that the police power of a state extends to the establishment, regulation and licensing of ferries on a navigable stream, being the boundary between two states, if not an undue burden upon interstate commerce.

The concept that the status of a ferry as a highway is determined by the character of service it renders was continued in the leading case of *St. Clair County v. Interstate Sand, etc., Co.,* 192 U.S. 454, 466, 24 S.Ct. 300, 48 L.ed. 518. In this case, the Supreme Court was concerned with the power of the state of Illinois to require a railroad company to secure a license for transporting railroad cars in interstate commerce from the county of St. Clair in Illinois to the Missouri shore and return. The court distinguished between "transportation" upon waters between two states and a simple "ferry," and held that the police power of the states does not extend to "transportation" by water across a river which does not constitute a ferry in a strict technical sense. By "strict technical sense" the court said it meant:

> "A ferry is a continuation of the highway from one side of the water over which it passes to the other, and is for the transportation of passengers or of travelers with their teams and vehicles and such other property as they may carry or have with them."

The most succinct statement of the fundamental proposition that a public ferry must be in continuation of a public highway is contained in *State v. Wie-*

thaupt, 231 Mo. 449, 565, 133 S.W. 329, which appears as follows:

> "The idea of a ferry presupposes a road travelled by the public which is bisected by the water course, the ferry serving in a different way, the same purpose that is served by a bridge. As the bridge is made for the road, not the road for the bridge, *so is a ferry made for the road, not the road for the ferry; the ferry is the incident, the road is the principal."* (Italics own)

Having clearly established that a ferry is a highway only when it is a continuation of, or a necessary link in a highway system, let us determine the status of the roads leading up to the ferry in the instant case. The Stipulation of Facts with respect to the status of the ferry, beginning at page 12 of the Transcript of Record, states the following facts. The ferry corporation holds a lease on a plat of land for a distance of some 500 feet from the ferry landing to a county highway as a means of ingress and egress between the ferry landing and the county highway. The ferry company holds a lease to lands on the Washington side extending from the ferry landing to a county highway for a distance of some 1500 feet. These roads are maintained solely for the ferry patrons and are not maintained by the state or county.

The trial court in its oral opinion of January 26, 1953 (R. 20), stated that even though the ferry operates "from approaches on both the Oregon and Washington sides of the Columbia, which are on private property," the ferry is still a public highway. The use of the word "approaches" in the opinion above is perhaps

not sufficiently explanatory of the actual situation in this case because these roads leading up to the ferry landings are not approaches as that word is usually understood. As stated in the opinion of the trial court dated August 28, 1953, beginning on page 21 of the Transcript of Record, the ferry on the Oregon side docked on property of the United States Government, namely, Umatilla Island, which was a part of the McNary Dam reservation. The road to which the approach from the ferry connected on the Oregon side is known as the Oil Depot Road which is maintained solely for access to a private oil tank farm leased from the United States and is not in any way owned by the State of Oregon. Hence, the roads from the landings, which are itinerant, are not a part of the public highways system of the State of Oregon, nor are they maintained by the state as set out in the stipulation.

The road leading from the ferry landing on the Washington shore of the river is likewise leased by the ferry company and maintained by it. The land is privately owned by the Switzer Estate and leased upon a yearly basis. From the ferry landing to where the private road connects to an unnumbered county road is approximately one quarter of a mile, which county road leads to Plymouth, Washington. This county road is maintained for the sole purpose of a farm-to-market road for the people living in that vicinity and does not lead to the ferry road. Consequently, the roads from the landings, which are itinerant, are not a part of the public highway system of the state of Washington or of any of its political subdivisions, nor are they maintained as such.

They are private roads established upon private property to be used only by ferry patrons. There is no record of any formal dedication and acceptance by grant and they have not been used long enough to accomplish a dedication by prescription through adverse possession or user. In any case, a highway by user or prescription cannot be acquired over lands held in trust by the government for the benefit of the public such as the land on the Oregon side which is owned by the United States Government and managed by the Bureau of Land Management. Nor can such a title be established as against the owner of the reversionary interest in fee on the Washington side. Am. Jur., Sec. 11, Highways. The most that the public could have is an easement by license to use the ferry. They were under the exclusive ownership and control of the ferry, subject only to the rights and uses of passengers and patrons of the ferry. Hence, they were not public highways but private property over and on which only patrons of the ferry had a right of passage. They were not maintained by the state or county. Hence, the prime essentials of unconditional use and the duty of public maintenance were absent which negatived their status as public highways. Am. Jur., Sec. 2, Highways.

Summarily, the facts of Record show that the ferry was not a continuation of, or a necessary link in public highways. Therefore, in a literal sense, this ferry was not a highway. Nor was it a highway in a strict sense because it is a physically different thing.

This Ferry Is Not a Public Highway

Assuming that this ferry was a highway in a literal sense, is it a "public" highway?

The word "public" is not defined in the Act itself. However, since a highway in the ordinary sense is a way open to all the people without distinction it is necessarily public in character, so perhaps the term "public" highway is a tautological expression. The term "public highway" in its broadest sense includes public ways of every description which the public have a right to use for travel. On the other hand, as used in its more limited sense, it does not include railroads, toll roads, or ways of necessity.*U. S. v. Rindge* (D.C. Cal.) 208 Fed. 611, 618.

Whether or not this ferry is a highway within the meaning of the Act, as we have seen, must first of all depend upon whether or not it is an actual continuation of or a necessary link in a highway. Secondly, in order to be a "public highway" it would seem that it must first be a "public ferry." This leads us to the definition of a "public ferry." It has been clearly established in all jurisdictions that a valid franchise is an absolute prerequisite to lawful establishment of a public ferry. 36 C.J.S. Ferries, Sec. 3. The right is a franchise which cannot be exercised without the consent of the state. This point has been expressly settled in this court by your decision in *Canadian Pac. Ry. Co. v. United States,* 73 F.(2d) 831, in which it was held that a franchise is a prerequisite to creation of a public ferry in the following language:

> "At common law a franchise was necessary to the creation of a ferry and as appears from Bou-

> vier, *an integral part of the definition.* * * * In the United States ferries are established by the legislative authority of the states, which is exercised either directly by a special act of the legislature, or through some inferior body to which power has been delegated under the provisions of general law. * * * The power of establishing ferries is never exercised by the federal government, but lies within the scope of those undelegated powers which are reserved to the states respectively'' 25 C.J. Sec. 5, p. 1052. See *Conway, et al. v. Taylor's Executor,* 1 Black (66 U.S.) 603, 17 L.Ed. 191.'' (Italics ours.)

An in the lower court decision (*U.S. v. Can. Pac. Ry., supra*), it was said:

> ''A ferry line is a *creation of local franchise* after finding of necessity, after notice and formal hearing by local authority and may be intrastate, interstate, and by the same token, international.'' (Italics ours.)

The fundamental principle that a public ferry is in relation to the highways and not of the water was continued in the latest federal case of *United States v. Puget Sound Navigation Co.,* 24 F.Supp. 431, which again involved the question of whether certain vessels were ferries within the meaning of a statute exempting international ferries from payment for overtime service of immigration inspectors. The federal court reviewed the prior cases, especially *St. Clair County v. Interstate Sand and Car Transfer Co., supra,* and *United States v. Canadian Pac. Ry. Co., supra,* and held that a ''ferry'' in its legal sense is a continuation of the highway from one side of the water over which it passes to

the other, and partly as a basis for deciding that the vessels in question were not "ferries," stated:

> "And no business of the vessels was done with particular reference to water connections between specific overland highways, of which there are many serving the myriad of communities."

The foregoing was affirmed in *Puget Sound Navigation Co. v. United States* (C.A. 9, Wash.) 107 F.(2d) 73, *Certiorari* denied 60 S.Ct. 608, 309 U.S. 668, 84 L.Ed. 1015.

Since the defendant had no license or franchise to operate a ferry within the boundaries of the state of Washington, it was held not to be a public ferry in the above case.

It is stipulated of record in this case at page 12 of the Transcript of Record that the "ferry company does not hold a license, franchise, or certificate of any kind from any government body, agency, or otherwise."

Since a "public ferry" cannot exist in Oregon, except under the provisions of Chapter 384 of the Oregon Revised Statutes which require a franchise, nor in Washington, except under the provisions of Volume 6, Title 32, Sections 5462-5483, Rem. Rev. Stat. of Washington, it is conclusive that this ferry was not a public ferry. The mere fact that its articles of incorporation empowered it to carry on a ferry business for the public did not bestow upon it a franchise since it has been specifically held in *State v. Portland General Electric Co.,* 52 Ore. 502, 95 Pac. 722, 98 Pac. 160, that no corporation, by virtue of its articles, could acquire a ferry franchise which can be conferred only by a special grant of the state.

Therefore if it was not a "public ferry" it was simply a private ferry. It seems only logical that if it was not a "public" ferry, it could not be a "public" highway since one is indispensible to the other.

The government contended, and the trial court seemed to base its opinion upon the fact, that the character of the service rendered alone made this ferry a public ferry. By this it meant that its conduct made it a common carrier. Whether this ferry is a common carrier or not is immaterial to the legal status of this ferry because since a public ferry is a creation or creature of local franchise, the existence of a lawful franchise is a prerequisite to its status as a public ferry. A ferry operator cannot enlarge his status to that of a licensed public ferry merely by his conduct. The right to keep a public ferry for toll is a franchise in Oregon which cannot be exercised without license or legislative grant, either mediate or immediate, and even a prescriptive right when recognized, is based on a prescription of a grant.

That the existence of a franchise is a condition precedent to the existence of a public ferry in Oregon is firmly established from the following quotation from *Hachet v. Wilson,* 12 Ore. 25, 6 Pac. 652, 653:

> "The principle to be deduced from these authorities of the nature of the franchise, and the uses and purposes for which a ferry is licensed and established, is that a ferry can only exist in connection with some highway or place where the public have rights, *and the grant of a ferry franchise.* The grant of a ferry franchise for the transportation of persons and property across a stream to

and from a place where there is no highway, or in which the public have no rights, would be void and inoperative. The object of a ferry being to connect highways or places in which the public have rights when intersected by streams, it becomes *when licensed and* established, a part of such highway or line of travel between such places." (Italics ours.)

A public ferry cannot exist without a franchise for a public ferry may be operated only with the consent of the state. Like highways, public ferries are for the benefit and convenience of the general public, and their maintenance and operation are governmental functions. *Deans v. Cocnino County,* 17 P.(2d) 801.

A common law ferry is not *per se* a public ferry unless it has a franchise. A franchise is a grant to carry a land highway over water. Without the grant there can be no continuation of the highway as a "public" highway. As seen in the preceding pages a "ferry" is a "highway" in a legal sense only when it connects highways. It does not do so in this case but even if it did, it still could not be a "public" highway since it is not a "public" ferry.

Appellants Were Not Engaging in An Interstate Operation on the Ferry

An interstate operation is defined under Sec. 302, Title 49, U.S.C. as follows:

"(20) The term 'interstate operation' means any operation in interstate commerce."

The term "interstate commerce" is defined under the same section as follows:

"(10) The term 'interstate commerce' means

> commerce between any place in a state and any place in another state or between places in the same state through another state, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water."

As can be seen, the essence of the definition requires a movement from a state to another state. Here, Appellant United had specific authority to serve all of the McNary Dam reservation on the Washington side of the river and it could serve all of the Oregon side of the reservation if no public highways were used. Hence, the transportation which was alleged to have been performed without authority was not an "interstate operation" but a movement from *a state to a federal territory* as the trial court found in its opinion of August 28, 1953 (R. 22).

A movement from a state to a point in a reservation in another state not conducted over public highways of the second state is not a movement in interstate commerce because it is not a movement from one state to another but from a state to a federal territory. The Interstate Commerce Commission has consistently so held as the following quotation from *North Coast Transportation Co., Extension,* MC 224 (Sub No. 6) 3 Federal Carrier Cases, Par. 30, 019 states:

> "Section 202 (a) of the Interstate Commerce Commission Act clearly limits the jurisdiction of the Commission to interstate and foreign commerce. Section 203 (a) (8) of the Act provides, the term 'state' means any of the several states and the District of Columbia. * * * Fort Lewis is not a

state. It is located within and entirely surrounded by the State of Washington."

It follows that a movement from a point within a state to a point in a reservation immediately adjacent to and bordering the same state, which may be performed entirely over private roads within the reservation is not a movement between states but from a state to a territory or reservation and therefore is not interstate commerce. Here it is admitted that all movements were to the reservation on the Oregon side of the river. They were not from one state to another and therefore were not in interstate commerce.

The facts, as found by the trial court on page 22 of the Transcript of Record, disclose that the operation was performed entirely within the confines of the reservation for the reason that the Columbia River was wholly within the McNary Dam reservation. Therefore, at no time was Appellant United within the State of Oregon. Hence, it was not an interstate operation but a movement from a state to a federal territory which is plainly not within the jurisdiction of the Commission as their foregoing decision admits.

CONCLUSION

The trial court, in its opinion set out on page 20 (a) of the Transcript of Record, seemed to feel that the application of a liberal construction to the definition of a public highway was justified, despite the criminal nature of the proceeding, by the inclusion of the words "within the meaning and intent" of the Act.

In the first place, did the Congress mean to include "private ferries?"

In the second place, did the Congress mean to include "ferries" when it specifically said "public highways" and then specifically defined them in Section 303, Title 49, U.S.C. without mentioning them?

It does not require citation of authority to establish that private roads or ways are not under the jurisdiction of the Act so this must also include private ferries.

Perhaps, Congress meant to include "public ferries" when they were legally and in fact "public ferries" and when they were actual continuations of, or necessary links, in public highways. But Congress never meant to include the situation present in this case where:

One. The ferry held no franchise, license, or permit and was a privately owned ferry.

Two. The ferry did not exist for, or in aid of a continuation of any highway, nor as a way of necessity.

In the instant case, it is stipulated of record that a carrier may operate or serve an entire reservation of the United States government even though beyond the particular territory authorized in its certificates as long as no public highways are used in the beyond operation. Here United had authority expressly contained in its certificate to serve all of Benton County, Washington, to the middle of the Columbia River. Consequently, the ferry was not used in the sense of being a public highway but merely as a method of serving the entire reservation which existed on both sides of the

river. The trial court was perhaps impressed by the fact that Section 306 (a) says "on any public highway or within any reservation under the exclusive jurisdiction of the United States." The Commission has traditionally left authorization to operate over reservation roads up to the reservation authorities. Their only requirement is that "public highways" be not traversed *outside* the reservation limits or certificated authority. They never intended that a technical interpretation to what was obviously only a means of getting around the reservation, such as this ferry, be applied to their ruling.

Having demonstrated that the judgment below was erroneous, we respectfully submit that this Honorable Court should reverse it with instructions to the lower court that the order denying the Motion for Dismissal be vacated and the motion granted.

Respectfully submitted,

/s/ George R. LaBissoniere,
Attorney for Appellant
United Truck Lines, Inc.

/s/ William P. Ellis,
Attorney for Appellant
Oregon-Washington Transport, Inc.

No. 14113

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED TRUCK LINES, INC., a corporation, and OREGON - WASHINGTON TRANSPORT, a corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the District of Oregon

BRIEF OF APPELLEE

C. E. LUCKEY,
United States Attorney;
VICTOR E. HARR,
Assistant U. S. Attorney;
WILLIAM L. HARRISON,
Attorney,
Interstate Commerce Commission.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-24-54—40

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BRIEF OF APPELLEE

JURISDICTION

By an information filed in the United States District Court for the District of Oregon, defendants (appellants here) were charged with violation of the Interstate Commerce Act, Part II, Section 306(a), Title 49, U.S.C.A., and Section 2, Title 18, U.S.C.A. Jurisdiction of the District Court was invoked under Section 3231, Title 18, U.S.C.A.

Jurisdiction of the Circuit Court of Appeals is invoked under Section 1291, Title 28, U.S.C.A.

PRELIMINARY STATEMENT

We are mindful that there is only one issue presented on this appeal and we are aware of the limitations imposed upon us before an Appellate Court with reference to the facts of record. However, the determination of the issue involves the explanation of various subordinate factors which we feel the appellants have not only confused but have distorted. These inaccuracies will be discussed in their time order and reference to the record will be made to support our claim of error. The trial judge heard and considered the matters hereinafter set out and it is felt that a re-statement of the salient facts there heard will supply a "void" which we think appears in appellants' brief. We feel that this Court, upon argument, would inquire about unstated facts and expect to be informed concerning them.

As far as pertinent here, United Truck Lines, Inc. (hereinafter called United), under a certificate of public convenience and necessity, issued by the Interstate Commerce Commission, has authority to serve all points in Benton County, Washington. It does not possess authority to serve any point in Oregon in the considered area and specifically Umatilla County, Oregon. (Stip. of Facts, par. X, R. 19). (These counties lie directly opposite of each other on either side of the Columbia River).

For the purpose of construction of the McNary Dam across the upper Columbia River, the United States Government pre-empted certain lands on both sides of

the river. This land in Washington lies partly in Benton County; and in Oregon, partly in Umatilla County. The land so taken is referred to as the McNary Dam Reservation. Construction of the dam was commenced on the Washington side in Benton County. United, under its common carrier authority, could and did serve and transport property to that part of the construction project. When construction was transferred to the Oregon side, United extended its service to that part of the dam site lying in Umatilla County.

It reached Umatilla County by crossing its vehicles over the Columbia River on a ferry owned and operated by Umatilla Ferry, Inc., a private corporation. We do not think the following point is material, but, after reaching the Oregon shore, United, purportedly to "legalize" its service to the McNary Dam Reservation—the closest boundary of which was some ¼ mile from the ferry landing—secured a right of way and constructed a private road which it traversed over this area. (Stip., par. X, R. 20).

Subsequently, for reasons best known to United, it "discontinued" service to the dam reservation located in Umatilla County and entered into an arrangement to interchange such freight as destined to that area at a point in Benton County with Oregon-Washington Transport, who has authority to serve both Benton and Umatilla Counties. That is how Oregon-Washington became involved in this proceeding. The alleged illegal operation under that arrangement formed the basis for the filing of the information against both carriers. The adjudica-

tion of the Court below on that matter is not in issue here.

Further, appellants, in their brief, make repeated reference to "a government owned island (Umatilla Island)" as the Oregon terminus of the ferry operation. A substantial portion of appellants' argument is based upon the fact that this island is government owned. The implications arising therefrom and the erroneous conclusions expressed in connection therewith require that this "island" be identified.

"Umatilla Island" is a plat of land containing 62.73 acres. At one time the waters of the Columbia River completely surrounded it. Its position was close to the Oregon shore. Accordingly, under Public Law, and in 1905, the Secretary of the Interior withdrew the land (island) from the public domain for use and in aid of reclamation purposes. Sometime between 1905 and 1949 two things happened, e.g.: (1) a natural change in the course of the Columbia River caused a receding of waters on the Oregon side and the area ceased to be an island—it became attached to the shore lands; however, the area is still referred to as Umatilla Island; (2) the Bureau of Land Management of the Department of the Interior seemingly forgot that the land had been reserved to the Federal government. For some considerable time the Ferry Company paid a rental to the State Land Board of Oregon for the part of the land it used for ferry purposes. On September 15, 1952, the Bureau of Land Management leased the island to the River Terminals Company, a bulk petroleum facility. Two

restrictions, amongst others, were imposed upon the lessee, namely, (1) that the lessee's use of the land "shall not interfere with the operation of the Umatilla-Plymouth ferry", and (2) the privilege of removing sand and gravel by the Corps of Engineers (McNary Dam). It is admitted that Umatilla Island is under the jurisdiction of a governmental agency.

No reference is made in the pre-trial Stipulation of Facts concerning "Umatilla Island" because its government status was not known at that time. The discovery was made in the latter course of the proceedings and the trial judge, then, required counsel to make a full inquiry of its status, which was done and presented to the Court in form of supplemental briefs. See: Stip. par. III, R. 17).

STATUTES INVOLVED

The Interstate Commerce Act, Part II, Section 306 (a), Title 49, U.S.C.A., provides:

> ". . . No common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation *on any public highway, or within any reservation under the exclusive jurisdiction of the United States,* unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations . . ." (Emphasis supplied).

Section 303(a) (12), Title 49 U.S.C.A., defines:

> "The term 'highway' means the roads, highways, streets and ways in any state."

QUESTION PRESENTED

That the appellants traversed the Columbia River and served a point in Umatilla County is admitted. (Stip., par. XI, R. 20). In crossing the river the services of the Umatilla ferry were utilized. The question presented, then, is: whether or not the operation across the Columbia River was "an operation on any public highway" within the meaning of Section 306(a), Title 49, U.S.C.A.

Appellants admit this is the only question presented (App. Br. 6); however, they have presented a separate and different question under the title *"Appellants were not engaging in an interstate operation on the ferry"* (App. Br. 25). We contend that the argument there advanced is wholly irrelevant. We have taken the opportunity, though, to reply thereto in order to correct mistakes, both as to the facts and the law, which we feel may be confusing to the Court in its determination of the single issue presented.

SUMMARY OF ARGUMENT

Appellants present their argument under the headings designated as:

1—This ferry is not a highway (Br. 9).

2—This ferry is not a public highway (Br. 21).

3—Appellants were not engaging in an interstate operation on the ferry (Br. 25).

Since the argument advanced under specifications (1) and (2) go directly to the issue involved, answer will be made generally by reference thereto in this brief. However, the position of the appellants with respect to specification (3) is so palpably in error, both as to facts and law, that special answer thereto will be made.

It is appellee's contention that:

I. *The Umatilla Ferry is a public ferry.*

The articles of incorporation of the ferry company state that the business which it proposes to engage in is to do a general ferry business for charge and toll. The company, in fact, not only holds itself out to the public to perform a general service, but does serve a heavy volume of unrestricted traffic. It pays a transportation tax as a public carrier to the Department of Internal Revenue.

II. *The absence of regulation does not, in law, affect the public nature of the ferry.*

As a matter of law, the absence of regulation does not determine the status of a facility. It becomes a public one by virtue of its occupation and performance in the public interest and not by virtue of the responsibilities under which it rests.

III. *The Umatilla Ferry is a public highway within contemplation of Section 306(a), Title 49, U.S.C.A.*

The objective intendments of the statute so require such determination and the authorities support such a status. We are dealing here with the act of transportation and not with the ferryboat as such.

IV. *Appellants operated within the State of Oregon over a public highway.*

Title to navigable waters is reserved to the sovereignty of the respective states. Oregon under its Admission Act, approved by Congress, retained title to the middle channel of the Columbia River and its territorial limits extend to that area.

ARGUMENT

I.

THE UMATILLA FERRY IS A PUBLIC FERRY

The Articles of Incorporation of Umatilla Ferry, Inc. provide that "the object of this corporation, the business in which it proposes to engage, is . . . to own and operate a ferry business for the purpose of carrying and transporting freight, passengers, baggage and express and do a general ferry business for hire and for toll . . ." (R. 13). It advertises a 24 hour service to the public generally (R. 18). It charges a uniform toll for passenger cars and trucks (R. 19). It pays a transportation tax as a public carrier to the Department of Internal Revenue (R. 19). During two representative months, namely: December, 1952—the ferry transported 5,522 passenger cars and 300 trucks; and, for October, 1952—it transported 10,034 passenger cars and 550 trucks, or an over-all total for the two months of 16,406 vehicles. Admittedly, the ferry is privately owned.

The first and leading case pertinent to the proposition of public versus private facilities is *Munn v. Illinois,*

94 U.S. 113. In that case 9 different warehouses in Chicago were performing a service in the transit storage of grain moving from the west to the east. The state of Illinois enacted a regulatory law with respect to them which among other things set a maximum charge for storage rates. One of the warehousemen, Munn, challenged the law on the grounds that the warehouses, being privately owned and operated, were not subject to state control. Inquiry by the Court was directed at the actual service performed and in upholding the right of the state to regulate, the Court said (pg. 132):

> "Certainly if any business can be clothed with a public interest, and cease to be juris private only, this has been. *It may not be made so by the operation of the Constitution of Illinois or by this statute, but it is by the facts.*" (Emphasis supplied).

Further, in the *Munn* case, the Court, in exploring the proposition before it, observed:

> "The function of ferries has been recognized in England from time immemorial and in this country from its first colonization . . . when private property is affected with a public interest it ceases to be juris private."

The distinction between a public ferry and a private ferry is pointed up when the factual circumstances surrounding the creation and actual operation of the Umatilla ferry is viewed in relation to the definition of a private ferry as contained in 22 Am. Jur., page 553, Section 2:

> "A private ferry is mainly for the use of the owner; and, although he may take pay for ferriage, he does not follow it as a business."

The Umatilla ferry company was incorporated for the sole purpose of conducting "a general ferry business for hire and for toll"; and, pursuant thereto, it established a ferry facility and extended its service to the public generally who in turn utilized the service in keeping with the primary purpose of the business.

II.

THE ABSENCE OF REGULATION DOES NOT, IN LAW, AFFECT THE PUBLIC NATURE OF THE FERRY

It was stipulated and agreed that the ferry operation is not regulated by any governmental agency and that the company does not possess a franchise, license or certificate of any nature whatsoever (R. 12). It is appellee's position that absence of regulation or of a franchise in no way affects the status of the ferry specifically with reference to its use and facility as an instrument used incidental to and as an aid to commerce (transportation).

That the ferry company has committed itself to a public undertaking cannot be denied. It not only holds itself out as ready and willing to serve the public generally but it, in fact, does so. When any such facility dedicates itself to the public interest, its legal status is determined by "virtue of its occupation and not by virtue of the responsibilities under which it rests." *Liverpool Steam Co. v. Phenix Insurance Co.,* 129 U.S. 397. The rationale of this principle of law is enunciated in *Munn v. Illinois,* supra.

Whether or not a license or franchise establishes the identity or status of a transportation facility was determined in *Bowles, Administrator v. Weiter,* 65 F. Supp. 359 (D.C. E.D. Ill.—1946). Weiter registered with the Public Service Commission of Illinois as a *contract carrier.* Under the Illinois statute the routes and rates of contract carriers were not regulated. However, in his operations, Weiter did not confine himself to contract carrier services but entered upon and performed *common carrier* services. Under the Price Administration Act, the rates of common carriers were exempt from price (rate) controls but contract carriers were not because their rates were not regulated by any governmental agency. Bowles, the Price Administrator, sought to subject Weiter to rate control because of his registration as a contract carrier. *Weiter had no franchise or license as a common carrier,* yet the Court in examining the factual situation, held Weiter to be exempt from the provisions of the Price Administration Act because he was, in fact, a common carrier. The Court stated:

> "In the instant case the defendant has held himself out to the public as a carrier of goods for hire—if Congress intended to exempt *only* those carriers whose rates were regulated, then it should have said so." (Emphasis supplied)

The Supreme Court has directly ruled on this proposition in *Vidalia v. McNeely,* 274 U.S. 676. In that case McNeely operated a ferry across the Mississippi River—one terminus being at Vidalia, La. He had no license or franchise. Apparently due to local politics, the town of Vidalia issued a license to another to operate a ferry at the same landing place as McNeely's and held McNeely

subject to penalty if he didn't get out. McNeely challenged the action under the "Commerce clause" and the Supreme Court said:

> "The complainant (McNeely) has full capacity to operate, and is operating a serviceable ferry — and the town is attempting to exclude his ferry on the ground that he is operating without a license. The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of its business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do."

That the Umatilla ferry operates in interstate commerce (between the states of Oregon and Washington) needs no elaboration. Admittedly, the states could invoke "police power" regulation under their recognized sovereign jurisdictions. But the primary power of regulating a public facility, operating in interstate commerce, lies in the Federal government under the Constitution. At least both of the states of Oregon and Washington have recognized this factor. In *Dean v. Washington Navigation Co.,* 59 Ore. 91, 115 Pac. 284 (1911), the Oregon Supreme Court stated:

> "It is not necessary to consider the question of whether the County Court of Wasco County (Ore.) could license a ferry crossing an interstate boundary."

The decision in the *Vidalia* case, *supra,* followed *Buck v. Kuykendall,* 267 U.S. 307. Buck operated a passenger motor carrier service between Portland and Seattle. The state of Oregon granted him a permit to operate in

Oregon, but the Public Service Commission of Washington refused to authorize operations in that state. Buck instituted Mandamus proceedings and when the case reached the Supreme Court of the United States, that Court held, in reversing the Supreme Court of Washington, that, under the circumstances there presented, the state's refusal to permit an interstate passenger carrier to operate within its boundaries was in violation of the "Commerce clause" of the Constitution.

Suffice it to say regulation does not create a public facility—but, when once an undertaking becomes affected with a public interest—regulatory control may follow as the exigencies of the circumstances permit or require.

Appellants contend that the Umatilla ferry is not a public ferry for the sole reason that it is not franchised or licensed (App. Br. 21). They cite *Canadian Pacific Ry. Co. V. United States,* 4 F. Supp. 851, affirmed on appeal, 73 F. (2d) 831, to support that position. Action against the Canadian Pacific was instituted by the United States to collect overtime pay for services rendered by inspectors in the U. S. Immigration Service. Recovery was claimed under Section 109(b), Title 8, U.S.C.A., which statute regulated the pay for inspection service rendered certain types of water borne vessels. A proviso exempted ferries from the provisions of the statute. This Court (9th Circuit) affirmed the District Court which allowed recovery upon the grounds that the operation, in fact, was not a ferry service falling within the proviso. In arriving at its conclusion, the Court recognized that traditionally and historically, public ferries

were created by and existed under a license issued by the Crown or a franchise granted by the sovereign. It further recognized that the state of Washington under Vol. 6, Title 32, Sections 5462-83, Rem. Rev. statutes "created" public ferries by franchise only after a finding of public necessity. The Canadian Pacific did not possess such franchise but the Court, in effect, held that the holding of a franchise was not determinative when it said

> "The type of vessels and the service rendered, *aside from the local license or franchise, obviously* determines the character of the service." (Emphasis supplied)

The Canadian Pacific was held not to be performing a ferry service, not because of its failure to own a franchise as a public ferry, but because of other specific reasons. In other words, this Court held the operation to be subject to the statute, and not within the exemption, because of the nature of the actual service rendered and not because of the failure to own a franchise.

The sovereign rights of states to license or franchise ferries is universally recognized so long as the regulation imposed is not an undue burden on interstate commerce. *St. Clair County v. Interstate Sand & Car Transfer Co.,* 192 U.S. 454. Historically, the regulation of ferries in Oregon arises in recognition of two factors, namely, (1) the protection of the prior rights of riparian owners, and (2) the necessity of reserving for the purpose of a ferry operation the state's right of condemnation of land for ingress and egress to the ferry landing. *Cason v. Stone,* 1 Ore. 39, *Gant v. Drew,* 1 Ore. 35, *Mills v. Learn,* 2 Ore. 215 (1852), *Hackett v. Wilson,* 12 Ore. 25, 6 Pac. 652.

The substance of the foregoing Washington and Oregon authorities is that a franchise is a privilege. The Crown originally extended the privilege to its subjects for the purpose of raising revenue for personal use. In the state of Washington any instrumentality connected with transporation is subject to proof of "public necessity" before the privilege is granted. Hence, a superior importance attaches to a franchise in that state. Oregon does not regulate any form of transportation with the same degree of compliance as the state of Washington. Suffice it to say, neither state has seen fit to exercise any regulatory control over the Umatilla ferry, and their failure to do so cannot be construed as a refusal to exercise a right which lies within the states' sovereignty[1].

III.

THE UMATILLA FERRY IS A PUBLIC HIGHWAY WITHIN THE PURVIEW OF SECTION 206(a) OF THE INTERSTATE COMMERCE ACT (49 U.S.C. 306(a))

On either side of the Columbia River, and in close proximity to where the ferry lands, there is an estab-

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[1] We are mindful that this Court in the *Canadian Pacific* case, *supra,* after reviewing the decision in *Vidalia v. McNeely, supra,* and other related cases said: "These cases do not sustain the contention that a franchise was not an essential element of a ferry." We interpret that language to mean that, under the Washington statutes, consideration should be given to this factor. But in view of the ultimate holding in that case, we believe the Court recognized the validity of the principle enunciated in the Vidalia case—that is, that a state may not require a license of a ferryman before he could carry on his business in interstate commerce.

lished public highway. On the Washington side its distance is some 1500 feet and on the Oregon side, it is some 500 feet (R. 17). The ferry company holds a lease to the lands over these respective areas and maintains them for ferry traffic (R. 17). The ferry company, by posted signs along the highways on both sides of the river, advertises the ferry service as a connecting and short-cut route to all points north-east-west, etc. (R. 18). The state of Oregon has, likewise, advertised the ferry service (R. 19).

That a highway can be any way within a state is defined in the Act (Section 303(a) (12), Title 49, U.S.C.A.). That a ferry is a distinct and recognized "way" as an instrument of commerce has been established and supported by the courts for time immemorial. A highway is a public way for use of the public in general, for passage and traffic without distinction. *McCarter v. Ludlum Steel and Spring Co.* (N.J.), 63 A. 761, 766, *Detroit International Bridge Co. v. American Seed Co.* (Mich.), 228 N.W. 791, 793. A ferryboat is as much an instrument of commerce as a bridge. *New York Central R. R. v. Board of Hudson County* (N.J.), 65 A. 860. In the early case of *New York v. Starin* (N.Y.), 12 N.E. 631, the Court said:

> "In a general sense, a ferry is a highway over narrow seas; and, further, a ferry is a continuation of a highway from one side of the water over which it passes to the other and is for the transportation of passengers or travelers and such property as they may have with them."

The case of *New York v. Starin, supra,* was cited with approval in *St. Clair County v. Interstate Sand &*

Car Transfer Co. (1904), *supra.* In *The Nassau* (D.C. N.Y. 1910), 182 Fed. 696, the question involved was whether or not a municipal ferryboat plying in New York bay was subject to a Federal statute pertaining to safety of operation. The trial court held the service performed not to be within the statute, which holding was reversed on appeal (188 Fed. 46). The reversal was based upon the type of boat used as defined within the statute and not because it was or was not a ferry. In describing a ferry service, the Court said:

> "The control of the ferryboat is limited and applies only to matters connected with the navigation of the boat and the furnishing of a place or highway for the purpose of transportation (cases cited). In this way the rights and responsibilities of a ferry are much nearer those of a toll bridge or road, where the charge is for the right to use—that is to enjoy—a public highway, including propulsion . . ."

In *United States v. Myers,* 99 Ct. Cl. 158, in a case involving overtime pay for custom inspectors at the Port of Detroit, the Court said:

> "There is no difference in purpose, as a means of conveyance of persons, baggage, or freight from one side of a river to another between a ferry, a bridge and a tunnel."

That a ferry is a way and the continuous part of a road or highway has been recognized in both Oregon and Washington. *Mills v. Learn, supra, Hackett v. Wilson, supra, United States v. Puget Sound Navigation Co.* (Wash., D.C.), 24 F. Supp. 431, *United States v. King County* (1922), 281 Fed. 686.

Appellants admit that the meaning of the term "highway" "may be limited to its strict sense by the subject

matter of the statute in which it is employed." (App. Br. 10). The statute here under consideration is one designed for the sole purpose of regulating transportation; and, by express definition it sought to regulate transportation, in interstate commerce, on "the roads, highways, streets and ways in any state." Where else could transportation be performed than on a "road", "highway", "street", or "way". Furthermore, in the application of a Federal regulatory statute, no authority is required to support the proposition that the government is not bound by specific usage or definition of particular matters by the separate states. The statute was made all inclusive for the specific purpose of avoiding such a situation as the appellants now contend. What the Congress said is that regulation shall extend to any public road, public highway, public street, or public way in any state.

A very appropriate and succinct statement relating to the point raised here is contained in the early case of *Gloucester Ferry Co. v. Pennsylvania* (1885), 114 U.S. 196. Although that case involved the right of a state to tax a ferry business, the Court observed:

> "Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose . . . The power to regulate that commerce . . . (is) vested in Congress. . . . The power also embraces within its control all instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

Of the cases cited by appellants in support of the proposition that "This Ferry is not a Highway" (App.

Br. beginning pg. 12), we have no particular quarrel. Some clarification is required, however. We do not contend that the physical ferry, itself, is a highway, but we do contend that the service offered by the ferry company is a highway service across the Columbia River because it furnishes travelers by vehicle the facility of a continuous and connecting route between the highways of Oregon and Washington.

Appellants cite *Menzel Estate Co. v. City of Redding* (Cal), 174 Pac. 48, as authority for the proposition that "the ferry itself is not a public highway even though the place where it is used may be one in a literal sense" (App. Br. 12). The controversy in that case arose over interpretation of a state statute concerning "free public highways". The Court held that a ferryboat, itself, could not be considered a public highway in contemplation of the statute *"though the place where the boat is used is a public highway in the sense that it is a continuation of the highways with which it connects."* (Emphasis supplied)

Appellants cite *Norton v. Anderson* (Wash), 2 Pac. (2d) 266, as authority for the proposition that "ferries and ferry premises including approaches are not highways or parts of highways." That case arose on a claim for personal injuries suffered by a person while using the passageway between the ferry landing and the city street. King County, one of the defendants, owned the ferry property but had leased it to Anderson, the other defendant, for operation. King County defended on the ground that the passageway was a highway and as such,

in its governmental capacity, it owed a limited duty to the injured pedestrian. The Court held the passageway was not part of the *ordinary* street or highway but it was *a reasonably necessary adjunct to the ferry system* and belonged to the county. The county was held jointly liable because under its contract with Anderson it had assumed responsibility for maintenance of the ferry property. We do not contend that the approaches of the Umatilla ferry, on either side of the river, are parts of the highways system of the states— they are an integral part and a necessary adjunct to the ferry operation.

In *Corbaley v. Pierce County* (Wash.), 74 Pac. (2d) 993, cited by appellants (Br. 14), a suit arose for a death which occurred on the ferry "slip". The ferry operation was leased by the county to private individuals. The Court held that the slip was part of the leased ferry operation (and not a county highway). The county was absolved from liability on the ground that the death occurred on ferry property and the sole responsibility under the lease contract resided in the ferry operators.

Appellants cite *United States v. Canadian Pac. Ry., supra,* (App. Br. 16), also, as authority for the proposition that a ferry must necessarily provide a continuous link between or a continuation of highways. We think the Umatilla ferry does exactly that. In that case the Court said (pg. 853):

> "A ferry may be said to be a necessary service by specially constructed boat to carry passengers and property across rivers or bodies of water from a place on one shore to a point conveniently opposite on the other shore and in continuation of a highway

making connections with a thoroughfare at each terminus."

The Canadian Pacific was held not to be operating a ferry because the service it performed was in conventional sea-going vessels traveling at a distance of some 145 miles and because the service was advertised and conducted as a scenic "Triangle Tour" not designed to connect with any highways.

In connection with this point, appellants argue, further, that the ferry service cannot be a continuation of a highway because the chain of continuity has been broken by the "private" nature of the approaches on either side of the river. They claim: "They (approaches) were under the exclusive ownership and control of the ferry, subject only to the rights and uses of passengers and patrons of the ferry. Hence, they were not public highways but private property over and on which only patrons of the ferry had a right of passage." (App. Brn. 20). This is solely an argument of convenience; it has no foundation in either fact or law. By the very nature of a ferry the approaches are a necessary incident to its operation. Particularly is this true here where the Columbia River is subject to both tidal influences and seasonal flood conditions. The approaches are an integral part of the ferryman's responsibility. This duty has been aptly recognized in *Calhoon v. Pittsburg Coal Co.,* 194 Atl. 768, where the Court said:

"A ferryman must maintain safe and suitable landing places for the ingress and egress of passengers and teams . . . The duty as to the safety of landings applies not only to the immediate means of getting

> on and off the boat, but requires the ferryman to furnish safe passageways between the ferry houses and the streets."

The necessity and corresponding right of a ferryman to maintain passageways from the landing place to the nearest street was recognized in *Vidalia v. McNeely, supra.* Also in cases cited by appellants, *Norton v. Anderson, supra* (App. Br. 13), *Corbaley v. Pierce County, supra* (App. Br. 14).

IV.

APPELLANTS OPERATED WITHIN THE STATE OF OREGON OVER PUBLIC HIGHWAYS

The two carriers, under the arrangement previously referred to, served the McNary Dam site by boarding the ferry in Washington and landing on Umatilla Island, Umatilla County, Oregon, and thence to destination by use of United's privately constructed roadway (R. 20)[2]. Umatilla Island to all intent and purpose is owned by the United States Government, at least the government has reserved and exercised jurisdiction over that area; and, the trial court so found (R. 22).

At this point it is necessary to correct various errors of appellants both as to the facts and law. In their brief,

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[2] United's private roadway must not be confused with the roadway improved and maintained by the ferry company to serve patrons between the landing place and the state highways. United's road extended due eastward along the Columbia River where it entered the McNary reservation. The ferry road extends due south and is wholly without the reservation.

at page 19, appears this statement: ". . . the ferry on the Oregon side docked on property of the United States Government, namely, Umatilla Island, *which was a part of the McNary Dam reservation.*" (Emphasis supplied). The appellants persistently attempted to prove before the trial court that Umatilla Island was part of the McNary reservation. They failed to do so because it is not a fact. The trial court found Umatilla Island was government property and that the McNary Dam site "is *also* on government property." (R. 22) (Emphasis supplied).

Again, at page 27 of appellants' brief, they state: "The facts, as found by the trial court on page 22 of the Transcript of Record, disclose that the operation was performed entirely within the confines of the reservation for the reason that the Columbia River was wholly within the McNary Dam reservation. Therefore at no time was Appellant United within the State of Oregon." Appellants would want this Court to believe that the ferry operated wholly within the reservation. The trial court did not so find. There is not one single word in the record or in the Court's opinion to support such a flagrantly erroneous statement. The ferry operation is conducted wholly and totally *outside* of any part of the dam reservation, (Stip., par. III, R. 17)—in Oregon, in Washington and across the river. Apparently, appellants hope to supply some basis for their contention (and further erroneous statement) that the transportation was "a movement from *a state to a federal territory*. As the trial court found . . ." (App. Br. 26). The only finding that a federally owned territory was involved in this pro-

ceeding is that the ferry docked on the Oregon side on land owned by the government—Umatilla Island (R. 22).

It would appear unnecessary to pursue this argument of the appellants further. Even granting that the ferry operated wholly within the McNary Dam reservation or assuming that there was some "reservation" extending across the river attached to the government owned Umatilla Island, these circumstances would not change the result because of the express wording of the statute. Section 306(a) extends jurisdiction of the Commission to transportation "on any public highway, or within any reservation under the exclusive jurisdiction of the United States . . ." The trial court so found (R. 23-24).

The Commission has held on numerous occasions that transportation over a public highway within a government reservation falls within the provisions of the above section. In *Missouri-Pacific Transportation Co.—Extension,* 51 M.C.C. 545, the Commission said:

> "The transportation by motor vehicle in interstate or foreign commerce or over highways within a reservation such as is here involved is subject to the regulations provided in the Act to the same extent as is like transportation over other highways."

See also: *Gerard, Common Carrier Application,* 12 M.C.C. 109, *Garrett Freight Lines, Extension,* 49 M.C.C. 631, *Alexandria, Barcroft, etc., Extension,* 30 M.C.C. 618, and *M. J. O'Boyle and Son, Inc., Interpretation of Certificate,* 52 M.C.C. 248.

Another appropriate case on this proposition is *M. R. and R. Trucking v. Dean and Dove,* 49 M.C.C. 93.

In that case a carrier was authorized to serve within 75 miles from Bay Minette (Florida). Under this authority it could enter a military reservation within the scope of its certificate authority, and serve most of it on private military roads, but the principal service within the reservation was to "headquarters area" which was farther than 75 miles from Bay Minette. However, a public highway traversed the reservation and the carrier could not reach the "headquarters area" without using the public highway within the reservation. The Commission held that even though the carrier could lawfully enter the reservation, its service to the "headquarters area" was unlawful since it required the use of a public highway to reach that destination.

North Coast Transportation Co., Extension (Unprinted I.C.C. decision reproduced in 3 Federal Carrier Cases 30,019) cited by appellant has absolutely no applicability here. The Commission there held that it had no jurisdiction because the traffic was intrastate. It said:

> "Fort Lewis is not a state. It is located within and entirely surrounded by the State of Washington. *Commerce between Fort Lewis and other points within Washington which does not in its course cross the boundary of that state* does not come within the quoted definition of interstate commerce." (Emphasis supplied)

We would be remiss in our duty if we failed to present this case with complete finality. Under the facts and law, appellants did operate within the state of Oregon.

In the first place, navigable waters are retained by a state by declaration upon admission to the Union. Ore-

gon retained jurisdiction of the waters of the Columbia River within its dedicated, declared, and approved territorial boundaries. Under the *Admission Act,* Vol. 9, Sec. 1 (page 71), Oregon Code, the boundaries of the State of Oregon were described (so far as pertinent here) as:

> ". . . to a point due west and opposite the middle of the north ship channel of the Columbia River; thence easterly to and up the middle channel of said river thereof near a point near Fort Walla Walla . . . including jurisdiction in civil and criminal cases upon the Columbia River and Snake River concurrently with states and territories of which those rivers form a boundary in common with this state."

Under Sec. 2 (page 72) the Admission Act provides:

> "The state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on said State of Oregon . . ."

Under Section 116, Vol. 8, Oregon Code, is an express statute regarding control of waters within the state including the Columbia River. One exception is noted and it refers to an area in and about the Celilo Falls which area was reserved to Celilo Indians under a fishing treaty between the Indians and the federal government. This area is far removed from the area here under consideration.

One of the first cases to enunciate the principle of state jurisdiction over waters within its boundaries is *Shively v. Bowlby,* (Oregon-1894) 152 U.S. 1. This case held that the sovereign right to waters and lands below high water mark was retained by the states. This principle was later followed in *Atkinson, et al. v. State Tax*

Commission of Oregon, 303 U.S. 20. That case involved the issue of whether or not the workers living within the Bonneville Dam reservation were subject to the State of Oregon income tax. The Court in holding that they were subject to the state tax said:

> "The state retained jurisdiction of the area within its boundaries including the North Channel of the Columbia River, which is within the territorial limits of Oregon."

In the second place, the withdrawal of "Umatilla Island" by the Secretary of the Interior did not affect the state's primary title and jurisdiction over the waters of the Columbia River within the territorial limits of Oregon. A leading case on this proposition is that of *Borax Consolidated, Ltd., et al. v. Los Angeles,* 296 U.S. 10. In that case the Department of the Interior had withdrawn and exercised jurisdiction over Mormon Island, situated in the inner bay of San Pedro harbor. The Department subsequently issued a patent on the island to a private individual and through successive transfers title was obtained by the Borax Company. The City of Los Angeles questioned plaintiff's right to the use of the shores of the Island between the high and the low water mark and brought suit to quiet title. The Court held that tide lands belonged to the city on the grounds that the tide lands were retained by the state originally and the Department could not convey any more land than it held in the first instance. The Supreme Court, in its decision, cited with approval the *Shively* case, *supra.*

Accordingly, the area of the Columbia River between the North Channel and where the ferry lands on Uma-

tilla Island was and is within the territorial boundaries of the state of Oregon and subject to that state's jurisdiction—subject of course to Federal regulations affecting all navigable waterways. Appellants traversed this area in the transportation of freight.

One further matter requires comment. Appellants argue that the trial court erred in that "it applied a liberal construction to a statute that was penal in nature" (App. Br. 7). In the first place, there is no evidence of record urging a liberal construction of the statute and the trial court, in its opinions, never at any time made any reference to the necessity of "liberalizing" the construction of the statute or that its decision was based upon a liberal interpretation in any manner.

In the second place, we, generally, agree with that basic proposition of law, but with the following reservation, assuming, of course, that the statute under consideration is a penal one. In *United States v. Fruit Growers Express Co.,* 279 U.S. 363, cited by appellants (Br. 7) in support of the proposition, the Court did hold that penal statutes must be given a *reasonably strict construction to effect the particular purpose Congress had in mind.* We think that case is particularly appropriate here. The Court there had before it two penalty provisions of the *Interstate Commerce Act,* Part I. The Court was required to construe both sections with relation to each other. We refrain from a long quotation, but the Court in reaching its decision (page 368) considered "the general object of the statute", "the intent of the penal provisions", that the penal provisions "were intended to be an ultimate protection to shippers"—other

than that the defendant was "entitled to a reasonably strict construction of the language used to effect the particular purpose that Congress had in mind."

Also, appellants state (Br. 9): "No authority will be implied in a matter involving jurisdiction." Appellants, defendants below, based their motion to dismiss on the ground that the government had failed to prove a violation of Section 306(a). That section is not jurisdictional—but is a declaratory section within a general regulatory statute.

CONCLUSION

We contend that appellants in using the Umatilla ferry to transport commodities between Benton County, Washington, and the McNary Dam site, Umatilla County, Oregon, performed a transportation service on a public highway in Oregon as defined in Section 306(a), Title 49, U.S.C.A.

Therefore, it is submitted that the order of the District Court is denying appellants' motion to dismiss was correct and that this appeal should be dismissed.

C. E. LUCKEY,
United States Attorney;

VICTOR E. HARR,
Assistant U. S. Attorney;

WILLIAM L. HARRISON,
Attorney,
Interstate Commerce Commission.

No. 14113

In the
United States Court of Appeals
For the Ninth Circuit

UNITED TRUCK LINES, INC., a Corporation, and OREGON-WASHINGTON TRANSPORT, a Corporation, *Appellants,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

REPLY BRIEF OF APPELLANTS

GEORGE R. LABISSONIERE,
10520 20th Avenue N. E.,
Seattle 55, Washington,

WILLIAM P. ELLIS,
1102 Equitable Building,
Portland, Oregon,
Attorneys for Appellants.

THE ARGUS PRESS, SEATTLE

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WILLIAM P. ELLIS,
1102 Equitable Building,
Portland, Oregon,
Attorneys for Appellants.

THE ARGUS PRESS, SEATTLE

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Appeal from the United States District Court for the District of Oregon

REPLY BRIEF OF APPELLANTS

INTRODUCTION

Stripped to its bare essentials, the Answering Brief of the United States of America, hereinafter referred to as the appellee, in effect is arranged under the same subject headings as those contained in Appellant's Opening Brief. Therefore, we shall arrange this reply brief under the same subject headings as are contained in appellee's answering brief with the discussion under each of these headings directed to the particular points raised by appellee's answering brief.

Before proceeding to a discussion of the contentions of appellee, one important matter must be disposed of. This is a statement on page 6 of their reply brief—"that the only question presented is: whether or not

the operation across the Columbia River was an operation on any public highway within the meaning of Section 306(a), Title 49 U.S.C.A." They then accuse appellants of presenting a separate and different question under the title "Appellants were not engaging in an interstate operation on the ferry" and that it is "wholly irrelevant."

In the first place, the sole question presented is clearly set out in our Specification of Error on page 6 of our brief and need not be restated here. The phrase "within the meaning of Section 306(a) of the Interstate Commerce Act" contained therein is clearly broad enough to include this question under our argument.

In the second place, appellants appealed "from each and every ruling, order or finding" contained in the judgment of the trial court dated August 28, 1953 (R. 21) which grounds specifically appear in the Notice of Appeal (R. 27).

Counsel for appellee overlooks the fact that appellants contested the jurisdiction of the trial court upon the ground that this was not "an interstate operation over the public highways within the meaning of Section 306(a), Title 49, U.S.C.A. Therefore, the Specification of Error and Notice of Appeal sufficiently apprised appellee of the contentions we would make on appeal.

I.

Appellee's Contention That the Ferry Near Umatilla Is a Public Ferry Is Erroneous.

Appellee in its argument under this heading, advances two propositions to support its contention. The first is based upon the premise that the ferry corporation has set out for one of its objects in its articles of incorporation, the carrying on of a general ferry business. The second, is that it has by its conduct, extended its service to the public generally (Apps. Ans. Br. p. 10). The first contention is sufficiently answered by the fact that a mere announced purpose in its articles of incorporation could not alone operate to elevate its status to that of a public ferry. *State v. Portland General Electric Co.,* 52 Ore. 502, 95 Pac. 722, 98 Pac. 160.

The second contention could not be decisive of the real issues here for the reason that a holding out to serve the general public may operate to create the *common law status* of a common carrier, but it does not create the *legal status* of a public ferry.

The case of *Munn v. Illinois,* 94 U.S. 113, relied upon by appellee goes no farther than to hold that grain warehouses, even though privately owned, are sufficiently clothed with a public interest so as to be legitimate subjects of regulation under the police powers. Furthermore, in determining the single question involved the Supreme Court also inquired into such factors as monopoly, utility and necessity. This case obviously goes no farther than to hold that any facility used by the general public may be regulated. Contrary to the statement of appellee that "inquiry by the court

was directed at the actual service performed * * *," the court was concerned only with the *power* to regulate and not the *status* of the warehouses.

Appellee has set forth as a quote on page 9 of its brief, a statement that we could not find in the majority opinion of Mr. Chief Justice Waite and apparently it is just a creation of appellee, pieced together from disjunctive phrases. A portion of the actual language appears as follows which may be somewhat similar:

> "In their exercise, it has been customary in England from time immemorial, and in this country from its first colonization, to *regulate* ferries, common carriers, hackmen, bakers, millers, wharf enginers, innkeepers, etc. * * * " *Munn v. Illinois, supra.* (Emphasis supplied)

Here, the Chief Justice was speaking of the subjects of regulation only. Later in the same opinion when discusing the justification for regulation he said:

> "Thus, as to ferries, Lord Hale says, in his treatise *De Jure Maris,* 1 Harg. L .Tr. 6, the King has 'a right of franchise or privilege that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the King. He may make a ferry for his own use or the use of his family, but not for the common use of all the King's subjects passing that way; because it doth in a consequence tend to a common charge, and is become a thing of public interest and use, * * *. So if one owns the soil and landing places on both banks of a stream, he cannot use them for the purposes of a public ferry, except upon such terms and conditions as the body politic may from time to time impose; * * *.' "

Here lies the essence of the distinction between a public ferry and this ferry. A public ferry exists as a monopoly and way of necessity under a special franchise which protects it from competition and non-compensatory rates. In return for this privilege of monopoly and protection, it owes a duty of charging only a reasonable toll and rendering reasonably continuous service which duties may be enforced by law. It accepts its franchise upon the condition that it will discharge its duties to the public. But a ferry without a franchise or license, as in the instant case, owes a duty to no one. It charges whatever it pleases and runs only when it wants to and is accountable to no one for failure to do so which is something a public ferry could not do. All other ferries in Oregon and Washington exist only by franchise and are regulated to the extent of being required not to abandon their service without permission. Appellee correctly quoted the law as stated in 22 Am. Jur., page 553, Section 2, on page 9 of its brief, but should have added the following sentence which reads:

> "His ferry is not open to the public at its demand. He may, or may not, keep it going."

This ferry is not open to the demand of the public and it may cease operating whenever it wants to.

II.

Appellee's Contention That the Absence of Regulation Does Not, in Law, Affect the Public Nature of the Ferry Is Fallacious.

In the first place, appellants did not contend that the existence or non-existence of *regulation* as that term is usually understood, determined the legal status of this

ferry. What we did contend, was that the existence of *a franchise is a condition precedent* to the existence of a *public ferry* because it is in law an actual *creation of local franchise.* The distinction between private and public ferries is aptly stated in 36 C.J.S., page 679, Section 2 as follows:

> " * * *, a distinction is made between private ferries which riparian owners may under certain restrictions establish for their own convenience, and public ferries which are franchises that cannot be exercised without the consent of the state and must be based on grant, license, or prescription."

Nor does the right of navigation on navigable waters confer the right to operate a ferry without a franchise. *State v. Faudre,* 54 W.Va. 122, 46 S.E. 269.

Appellee's citation of the *Bowles* case on page 11 of their brief is not applicable to the issue involved here. In that case, Weiter was registered as a contract carrier but held himself out to everyone as a common carrier, so the Court found him to be one. It is extremely difficult to understand how a case dealing with a common law status based upon a course of conduct can have any applicability to determining the legal status of a ferry. Since a public ferry is a *creation of franchise,* it seems immaterial whether it is a common or a contract carrier. Here, we are dealing with the *existence* of a status and not its conduct or classification.

Appellee on page 11 ambitiously states that: "The Supreme Court has directly ruled on this proposition." We do not know what they meant by "proposition." Presumably they meant that the Supreme Court has ruled that the states may not require a franchise of a

ferry on navigable waters bordering their state. If this is what they meant they proceeded to refute their own statement by the following quotation on page 12 of their brief:

> "Admittedly, the states could invoke 'police power' regulation under their recognized sovereign jurisdictions."

And again on page 14:

> "The sovereign rights of states to license or franchise ferries is universally recognized so long as the regulation imposed is not an undue burden on interstate commerce."

And also in their footnote on page 15:

> "We are mindful that this Court in the *Canadian Pacific* case, supra, after reviewing the decision in *Vidalia v. McNeely,* supra, and other related cases said: 'These cases do not sustain the contention that a franchise was not an essential element of a ferry.' "

From the foregoing, it seems apparent that the Supreme Court has never rejected the common law concept of a public ferry. And, as to the power of the states to license ferries, the propositions set forth by appellee only affirms that under their reserved police powers, the states, and not the federal government, have the authority to establish ferries upon waters forming a boundary between the states. *Candadian Pacific Railway Co. v. U.S.* (C.A. 9, Wash.) 73 F.(2d) 831, 833.

Appellee contends on page 13 of its brief that we claimed the non-existence of a franchise was the *sole reason* for the finding of this Court in the above decision. They overlooked our statement on page 16 of

our brief that the Court applied "three concurrent tests."

> "One, the conventional seagoing construction of the vessels; two, the character of the service provided in that it did not furnish a connecting link for highway traffic; three, the absence of compliance or attempt to comply with local ferry laws."

Among these three "tests," the existence of a franchise is a very "essential element" of a ferry as your decision makes clear.

Both the *Vidalia v. McNeely* (274 U.S. 676) and *Buck v. Kuykendall* (267 U.S. 307) cases cited by appellee go no farther than to hold that a state has no power to arbitrarily withhold a franchise but it still may require one.

III.

Appellee's Contention That the Umatilla Ferry Is a Public Highway Within the Purview of Section 306(a) Is Erroneous.

Appellee admits on page 19 of its brief that the physical ferry, itself, is not a highway but contends that the service rendered by the ferry was a "highway service" because it furnished the facility of a continuous and connecting route between two highways.

There are two answers to this. The first is found in the cases cited by appellee in its brief which upholds the proposition, relied upon by us, that a ferry is a highway only when it is a continuation of or a necessary link in two highways. The second answer lies in the fact that we did not actually use the ferry as a "highway" to reach a public highway on the Oregon side but

merely as a boat or ferry service to reach our private road on the Oregon side on Umatilla Island. Hence, it was not a "highway service" but a pure "ferry service" in order to serve the entire reservation as it is stipulated we could do. This point cannot be overemphasized since the very status of a ferry as a highway depends upon whether it is actually used as a connecting link in a highway. The following quotation from *Conway v. Taylor,* 1 Black 629, 17 L.ed. 201 will illustrate this concept:

> "A ferry is in respect of the landing place, and not of the water."

Remembering that the ferry is made for the road, not the road for the ferry, because the road is the principal, the status of this ferry as a highway on the Oregon side must be determined from *its landing place,* which in this case was our private road. If we had been using the ferry to reach a public highway on the Oregon side, then in a literal sense this ferry would be a continuation of the highway, but such is not the case here.

IV.

Appellee's Contention That the Appellants Operated Within the State of Oregon Over Public Highways Is Erroneous.

Appellee under this argument first points out the fact that Umatilla Island is owned by the United States Government in that it *"has reserved and exercised jurisdiction over that area."* After having admitted this fact they then state that it is necessary to "correct various errors of appellants both as to the facts and the law." They then quote from our brief a statement to

the effect that Umatilla Island was a part of the McNary Dam reservation (App's. Ans. Br. p. 22). Next, they make the statement that "the ferry operation is conducted wholly and totally *outside* of any part of the dam reservation (Stip., par. III, R. 17)—in Oregon, in Washington and across the river." They also state in a footnote on page 22 of their brief that: "The ferry road extends due south and is wholly *without* the reservation." (App's. Ans. Br. p. 22, 23). These two assertions are contrary to the actual facts as can be shown by reference to their own argument on page 27 of their brief as follows:

> "In the second place, the *withdrawal* of 'Umatilla Island' by the Secretary of the Interior did not affect the state's primary title and jurisdiction over the waters of the Columbia River within the territorial limits of Oregon." (Emphasis supplied)

In this statement, they have admitted that Umatilla Island has been "withdrawn" from public lands and yet they deny it is a reservation. As a matter of fact, relying upon the premise that this island had been withdrawn, the trial court in its opinion, set out on page 22 of the Transcript of Record, found the following:

> "The ferry on the Oregon side docked on *property of the United States Government, namely, Umatilla Island,* and United's trucks proceeded from that point via a *private road* to the point of destination, *the McNary Dam site which is also on government property."* (Emphasis supplied)

It seems reasonable to assume that the trial court

intended that "government property" is land withdrawn or reserved to the United States and hence a reservation since it had already been stipulated that the McNary Dam site is a reservation of the United States Government and it described Umatilla Island in the same terms as it did McNary Dam site. To further support this, the actual facts, as they were known to the trial court and the appellee should be placed before this Court in order to clarify what appellees meant by the term "withdrawal" on page 27 of their brief. In their Preliminary Statement on page 2 of their brief, they set out certain statements, some of which are wholly outside the record and others are only partly true.

The true facts as agreed upon by all of the parties and the trial court are that the ferry in question landed at a point on the shore on the Oregon side of the river which is known as Umatilla Island. The true ownership of this island had been in dispute for many years until a hearing was held which resulted in holding that Umatilla Island was an island in existence when the state of Oregon was admitted into the Union in 1859 and therefore public lands of the United States based upon the ruling of the Supreme Court in *Scott v. Lattig,* 227 U.S. 229 (1913). (See Official Decision No. A-24715 of the Secretary of the Interior, dated May 19th, 1949.)

Having established that this island is public land of the United States, the question then is what is its present status. Since appellee has pointed out that it is "withdrawn," we shall point out by whom.

Historically, the property has been withdrawn from public lands ever since August 19, 1905, when it was reserved for the Umatilla Reclamation Project. Lands "withdrawn" are no longer public lands and become a reservation. *U.S. v. Minidoha and S.W.R. Co.* 176 Fed. 491.

Appellee states on page 23 of its brief that appellants persistently attempted to prove before the trial court that Umatilla Island was part of the McNary Reservation but that "they failed to do so because it is not a fact."

Appellee in its Preliminary Statement would have this Court believe that the withdrawal relied upon by the trial court was this withdrawal of 1905 by the Secretary of the Interior when they well know that the trial court had before it, when it wrote its opinion of August 28, 1953, a certified record of the Land and Survey Office of the United States Department of Interior, Bureau of Land Management, showing that Public Land Order No. 606 of September 13, 1949, withdrew public lands for use of the Department of the Army for flood control purposes, reserved for McNary Dam in T. 5 N., R. 28 E., W.M., Washington, Section 2 Lots 1, 2, 3, 4, 6, 7 and 8; Section 4, Lots 1, 2 and 3 SENE, SENW, NESW, and all islands in the Columbia River in this township. Umatilla Island is admittedly included in this withdrawal order.

This withdrawal was made pursuant to Section 141, Title 43, U.S.C.A., which authorizes withdrawals of public lands for water power sites, which is one of the purposes of the McNary Dam project. This last with-

drawal of 1949, being in aid of commerce and navigation, of course took precedence over earlier withdrawals including reclamation purposes. Therefore, all of Umatilla Island was part of the McNary Dam reservation which makes their statement that the ferry road is wholly *without* this reservation incorrect.

As the only basis for their assertions, appellees point to the Stipulation on page 17 of the record at Paragraph II where it is stated that the ferry leases from the state of Oregon its approach on Umatilla Island. But they had already contradicted this by pointing out that this was stipulated in error before it was discovered the island was government property (App's. Ans. Br. p. 5).

Appellees have set out on page 4 of their brief a statement that on September 15, 1952, the Bureau of Land Management leased the island to the River Terminals Company. This statement is simply a claim of appellees that was never accepted by the trial court. The only evidence used by the trial court as the basis of its finding that Umatilla Island is "Government Property" was the withdrawal order set out above for the McNary Dam Project, and the original decision that it was public land.

The only reason that we did not state the foregoing facts in our Opening Brief is because we thought that the status of Umatilla Island as a government reservation had been fully settled by the Opinion of August 28, 1953, which finding we were not contesting. For this reason we did not designate the record applicable to this issue in our Designation of Contents. If this

Court feels that the opinion of August 28, 1953 (R. 21) does not completely settle this point, it has no alternative but to disregard our argument on this contention in this appeal because of lack of a complete record.

In our argument before the trial court, we attempted to prove that the area of withdrawal referred to above, or limits of the reservation proper, included not only Umatilla Island but extended to the approximate middle of the river which is the boundary of the State of Washington. However, the trial court did not pass upon this contention in its opinion because it said it was immaterial, in view of its previous finding that the ferry was a public highway (R. 22, 23). By this it meant that it was immaterial whether the ferry was *inside or outside* the reservation from the middle of the river to the shore on Umatilla Island, since it was still a public highway.

Appellees correctly pointed out that Oregon took title, upon its admission to the Union in 1859, to the waters, and land underneath, of the navigable Columbia River within its territorial boundaries described on page 26 of their brief. However, this does not affect the basis of our contention because we never claimed that the *McNary Dam reservation on the Oregon side was not within the territorial boundaries of Oregon.* Admittedly, the reservation on the Oregon side is within the boundaries of that state. But they are still federal territories in a jurisdictional sense even though situated within the territorial confines of a given state. This will be made clear from the following citation from *Lowe v. Lowe,* 150 Md. 592, 133 A. 729, 733, 46 A.L.R. 983, wherein the Court said:

> "The great weight of authority is to the effect that lands acquired in accordance with the provisions of the Federal Constitution cease to be a part of the State, and become federal territory, over which the federal government has complete and exclusive jurisdiction and power of legislation."

Therefore, it does not follow that the ferry was operating *outside* the reservation. In our brief, we did say that *"the facts,* as found by the trial court on page 22 of the Transcript of Record, *disclose* that the operation was performed entirely within the confines of the reservation, etc." If we meant to imply that the trial court found this, we were in error. What we meant was that the "facts" as set out by the trial court in its opinion, *disclose* this, not that the court disclosed this. We simply thought that the Court's opinion settled this as a fact and based our contention on this understanding. It is still our contention that the ferry was *within* the reservation even though within the territorial limits of Oregon. Appellees overlook the fact that Oregon took title to these waters *subject to an easement* in the federal government for development of commerce and navigation. *Shively v. Bowlby,* 152 U.S. 1, 47, 48, 57, 58. *Barney v. Keokuh,* 94 U.S. 324, 338; *Brewer-Elliot Oil and Gas Co. v. U.S.,* 260 U.S. 77, 83, 85. Since McNary Dam project is a flood control and navigation project it is in aid of commerce and navigation. For this reason, it was not necessary to buy the land under the water upon which the dam is situated from the two states. It is, incidentally, in this sense that we maintained the ferry was within the reservation.

As the trial court stated, it was immaterial as to the confines of the reservation since it had found we were on a public highway and Section 306(a) extends jurisdiction of the Commission to transportation "on any public highway, or within any reservation under the exclusive jurisdiction of the United States * * * " (R. 23-24). Admittedly, operations *over a public highway* within a government reservation falls within the provisions of this section. But private roads are not included because the Commission has consistently held that operations within a reservation are a matter for local control. In *Missouri-Pacific Transportation Co., Extension,* 51 M.C.C. 545, the Commission said:

> "The circumstances which control the route to be followed and terminals within the reservation are local problems which properly may be left to the managerial discretion of the applicant, and the regulation of local authorities. The extent to which applicant may operate within the military reservation beyond the entrance via Kansas Highway 92 is a matter which may be determined by applicant and the military officials of the reservation."

Appellees argue on page 25 of their brief that the *North Coast Transportation Co.* case, 3 Fed. Car. C., Par. 30,019, cited on page 26 of our brief, is not applicable "because the traffic was intrastate." But this is wholly incorrect because that case plainly states that the applicant there sought a "certificate in interstate or foreign commerce." The carrier actually sought to extend its authority to transport passengers from points outside the state to points inside of the reservation proper because it already had authority up to the en-

trance to the reservation. This extension from the entrance into the reservation was held not to be a movement from a state to a state but to a federal territory and therefore not within the scope of Section 306(a).

The same situation is applicable here despite the fact that the territorial boundary of the State of Oregon is crossed at the middle of the river, providing this ferry is not a public highway. Therefore, the entire validity of the third argument of our opening brief depends upon a determination of the status of a ferry.

CONCLUSION

For the reasons stated in our Opening Brief and in this Reply Brief we believe that the appellants, in using this ferry only as a means of serving the entire reservation, were not carrying on an interstate operation on a public highway from the middle of the river to the landing on Umatilla Island within the meaning of Section 306(a), Title 49, U.S.C.A.

Therefore, the order of the District Court denying appellants motion to dismiss was an error and should be reversed with instructions to grant the said motion and dismiss the information.

Respectfully submitted,

GEORGE R. LABISSONIERE,
Attorney for Appellant
United Truck Lines, Inc.

WILLIAM P. ELLIS,
Attorney for Appellant
Oregon-Washington Transport, Inc.

No. 14114

United States
Court of Appeals
For the Ninth Circuit.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-18-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

J. B. TIETZ, ESQ.,
257 South Spring Street,
Los Angeles 12, California,
Attorney for Defendant and Appellant.

LLOYD H. BURKE, ESQ.,
U. S. Courthouse & Post Office Bldg.,
San Francisco 1, California,
Attorney for Plaintiff and Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 33399

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM EDWARD FRANKS,

Defendant.

INDICTMENT

(Violation. Section 12(a), Universal Military Training and Service Act, 50 U.S.C., App. 462(a)).

The Grand Jury charges:

That William Edward Franks, defendant herein, being a male citizen, of the age of 20 years, residing in the United States and under the duty to present himself for and submit to registration under the provisions of Public Law 759 of the 80th Congress, approved June 24, 1948, known as the "Selective Service Act of 1948" as amended by Public Law 51 of the 82nd Congress, approved June 19, 1951, known as the "Universal Military Training and Service Act," hereinafter called "said Act," and thereafter to comply with the rules and regulations of said Act, and having, in pursuance of said Act and the rules and regulations made pursuant thereto, become a registrant of Local Board No. 19 of the Selective Service System in Napa County, California, which said Local Board No.

19 was duly created, appointed and acting for the area of which the said defendant is a registrant, did, on or about the 3rd day of November, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly fail to perform such duty, in that he, the said defendant, having theretofore been duly classified in Class I-A and having theretofore been duly ordered by his said Local Board No. 19 to report at Napa, California, on the 3rd day of November, 1952, for forwarding to an induction station for induction into the Armed Forces of the United States, and having so reported, and thereafter having been forwarded to an induction station, to wit, in the City and County of San Francisco, California, did on the 3rd day of November, 1952, in the City and County of San Francisco, State and Northern District of California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto.

A True Bill,

/s/ RUDOLPH G. ATSTULIM,
Foreman.

/s/ CHAUNCEY TRAMUTOLO,
United States Attorney.

Approved as to Form:
/s/ J.B.T.

[Endorsed]: Filed December 4, 1952.

United States District Court for the Northern District of California, Southern Division

No. 33399

UNITED STATES OF AMERICA,

vs.

WILLIAM EDWARD FRANKS.

JUDGMENT AND COMMITMENT

On this 4th day of August, 1953, came the attorney for the government and the defendant appeared in person and with counsel.

It is Adjudged that the defendant has been convicted upon his plea of Not Guilty and a Finding of Guilty of the offense of violation of Section 12(a), Universal Military Training and Service Act, 50 U.S.C., App. 462(a). (Defendant, William Edward Franks, did on November 3, 1952, at San Francisco, California, knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States; said defendant had theretofore been duly classified in Class I-A and had theretofore been duly ordered by Local Board No. 19 of Selective Service System at Napa, California, to report for forwarding to an induction station, etc.), as charged in the Indictment (single count); and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Eighteen (18) Months.

Further Ordered that defendant be granted a ten (10) day stay of execution of judgment.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ GEORGE B. HARRIS,
United States District Judge.

The Court recommends commitment to: an institution to be designated by the U. S. Attorney General.

C. W. CALBREATH,
Clerk.
By /s/ HOWARD F. MAGEE,
Deputy Clerk.

Examined By:

/s/ J. W. RIORDAN, JR.,
Assistant U. S. Attorney.

[Endorsed]: Filed August 7, 1953.

Entered August 7, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, William Edward Franks, resides at 2021 West Pueblo Street, Napa, California.

Appellant's Attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C., Title 50 App., Sec. 462, Selective Service Act, 1948, as amended.

On August 4, 1953, after a verdict of Guilty the court sentenced the appellant to eighteen months' confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 10, 1953.

The United States District Court, Northern District of California, Southern Division

No. 33399

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM EDWARD FRANKS,

Defendant.

Before: Hon. George B. Harris, Judge.

REPORTER'S TRANSCRIPT PROCEEDINGS

Appearances:

For the Government:

LLOYD H. BURKE, ESQ.,
United States Attorney, By

JOSEPH KARESH, ESQ.,
Asst. U. S. Attorney.

For the Defendant:

J. B. TIETZ, ESQ.

Friday, May 22, 1953—10:00 A.M.

The Clerk: United States of America versus William Edward Franks; United States of America versus Samuel Rueben Bippus on trial.

Mr. Tietz: Ready for both Defendants. Both are in Court, your Honor.

The Court: Have juries been regularly waived?

Mr. Tietz: Yes.

Mr. Karesh: May it please your Honor, in relation to these two cases, one is United States against Franks, No. 33399. The other is the case of United States against Bippus, No. 33400. As I indicated, there are going to be certain stipulations which will immeasurably shorten the trial.

Both indictments charge the defendants with having registered under the Universal Military Training and Service Act which amended, of course, the Selective Service Act of 1948. Both indictments charge the defendants with having been duly classified in Class 1-A, having been ordered for induction, and having at San Francisco, California, knowingly refused to submit to induction into the Armed Forces of the United States.

In relation to the case of United States versus Franks, the evidence will show that he is a registrant of Local Board [2*] 19, Selective Service System, Napa County, California; and that the date of the alleged refusal to submit to induction in San Francisco, is November 3, 1952.

The evidence will show in relation to the defendant Samuel Rueben Bippus, he is a registrant of Local Board No. 21 of Sacramento, County of Sacramento, California, and the date of the alleged refusal to knowingly submit to induction in San Francisco, California, is the 6th day of November, 1952.

There will be no dispute, may it please your Honor, in both of these cases as to whether or not

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***Page numbering appearing at top of page of original Certified Transcript of Record.**

the defendant knowingly refused to submit himself to induction on the dates set forth in the indictment.

It is stipulated that on the dates set forth heretofore mentioned, each defendant appeared at the Induction Station in San Francisco, completed all the processes leading up to the actual induction. Each defendant was told that the step forward would constitute induction into the Armed Forces, that the name of the Service in which they would be called would be read out, and at that stage the name and the Service was called that each was to step forward and become inducted.

It is stipulated, your Honor, that the process and procedure were followed, each defendant at the point of stepping forward refused to step forward on the dates in question and be inducted into the Armed Forces of the United States. [3]

It is further stipulated that each defendant was given a second chance by appropriate Military officials to step forward and submit to induction; each defendant again refused.

Each defendant, it is stipulated, was warned of the consequences of a refusal to submit to induction, and each defendant spoke to FBI agents and likewise indicated a refusal to be inducted into the Armed Forces.

Is that the stipulation?

Mr. Tietz: So stipulated on behalf of each defendant.

Mr. Karesh: Counsel has stipulated, may it please your Honor, that the presence of the Clerk upon the witness stand may be waived and that in

each case we may offer a complete photostatic copy of the Selective Service Registration Card and Cover Sheet of each defendant in question, photostatic copies, of course, in lieu of the original file in the possession of the appropriate Selective Service officials.

At this time, your Honor, in the case of United States against William Edward Franks, we offer his complete photostatic file, and similarly of case of United States against Samuel Reuben Bippus, we likewise offer a complete photostatic file and Registration Card of this particular defendant.

Mr. Tietz: No objection.

The Court: It may be marked in evidence.

The Clerk: United States Exhibit in Case 33399 No. 1 in evidence. [4]

(Thereupon file above referred to was received in evidence and marked United States Exhibit No. 1, Case No. 33399.)

The Clerk: United States Exhibit in Case No. 33400, Exhibit No. 2 in evidence.

(Thereupon the file above referred to was received in evidence and marked United States Exhibit No. 2, Case No. 33400.)

Mr. Karesh: Might I consult with Defense Counsel?

The Court: Yes.

Mr. Tietz: May we call them both Exhibit 1 in each case? If we call them that we will keep our nomenclature correct, United States Exhibit in case 33400, No. 1 in evidence.

Mr. Karesh: And in the other case, No. 1 in evidence, too.

The Clerk: No. 1 in evidence.

(Thereupon United States Exhibit No. 2, previously identified above, was withdrawn as Exhibit No. 2 in Evidence and redesignated as Exhibit No. 1 in Evidence, Case No. 33400.)

Mr. Karesh: I think perhaps in the interest of time that counsel might make his motion, and if it has to do with any alleged procedural denial or an alleged denial on the basis in fact, we can then show to the Court, we believe, [5] that there has been no such procedural denial, nor has there been any denial of basis in fact in these classifications.

Mr. Tietz: What I had planned to do, subject to the Court's approval in each case is this: At this stage, to make a motion for judgment of acquittal, present my grounds. If I am unsuccessful I will present some evidence and then renew my motion and make some additional grounds, and the Court would have the case.

I will now make a motion for judgment of acquittal in the Franks Case. I have five principal points to present. I will go through them, either rapidly if the Court indicates that the Court doesn't care to hear any more, or has heard enough, or I will dwell as long as the Court might indicate.

The Court: Well, you proceed in your own way. I will not hasten you. You go ahead in your own way.

Mr. Tietz: The first ground is this: Exhibit 1

shows that the advisory opinion of the hearing officer was made to the Attorney General, and it was transmitted by him with a letter of recommendation to the Appeal Board which was based on an illegal reason and that the adoption in toto without any further comment by the Attorney General was also placing the matter before the Appeal Board on an illegal basis.

For the Court follow, perhaps, the facts of the case a little better, Page 40 of Exhibit 1 is the Attorney General's letter of recommendation to the Appeal Board, and Page 44 is [6] the principal page of the Hearing Officer's advisory opinion. Fortunately, in this case the Hearing Officer's advisory opinion is clear-cut. He says this registrant is a sincere, genuine man, everything about him is all right except one thing. So that we have only that one thing to consider, it is clear-cut and the question will be, in my opinion, whether that is an illegal basis and I will argue that there are two separate fallacies that make it an illegal basis.

In order to have the matter clearly before the Court at this stage I will read from Pages 43 and 44 of Exhibit 1. The Hearing Officer, after listening to the registrant, to his witness who he brought with him, reading the FBI Investigative Report says this at the end:

"The registrant is a genuie, conscientious objector, both as to combatant and non-combatant military service. On the whole, the Hearing Officer was impressed with the sincerity of the registrant;

however, the depth and maturity of his sincerity is questionable, because, in response to questions propounded by the Hearing Officer, the registrant stated that if there were no other work available, he would be willing to accept employment in a Naval shipyard.

"In the circumstances, it is felt that the registrant is not completely motivated by deep religious conviction in his professed opposition [7] to participation in war.

"Conclusion

"Predicated upon the theory expressed in the last paragraph, it is recommended that the appeal of the registrant be not sustained and that he be classified 1-A."

Not even a recommendation for non-combatant work. Now, if that is a good legal reason, then my whole point falls, but if it isn't a good legal reason, then there is a denial of due process.

I say this, start at the beginning. It is clear by the Act and by the Regulation that before a registrant can be given either one of the two conscientious objector classifications, there must be a finding of fact that he has religious training, that he has a religious belief, he believes in a Supreme Being and thus his religious training and religious beliefs are based and motivated by his relationship of these beliefs to a Supreme Being.

So, the registrant who is given the 1-AO classification is just as much, just as genuine, just as sincere and has to meet the same qualifications. And

what happens to him? He is placed into the Army uniform, he does work like binding up wounds and fitting a man to go back into battle if he is in the Medics.

If he is in the Transportation Corps he drives trucks [8] with ammunition. If he is in the Signal Corps he lays wires. He does all the things that a man in a Naval shipyard would do.

So if a man to qualify for the 1-AO must have—must be a sincere conscientious objector, then this reason is wrong. That is very briefly the point there.

Now, some courts have pointed out very clearly that when there is an illegal reason by the Hearing Officer, the whole thing falls. I will read a part of the opinion in the case of the United States of America vs. Walter Kobil, United States District Court, Eastern District of Michigan, Southern Division, Case No. 32390.

Now this, your Honor, like a number of the cases that I will be referring to—although not all—only a small portion are unreported cases. It has been my experience that while district judges are not too reluctant when they meet a legal point to quote, they are somewhat reluctant to write up opinions. That was my experience last week, I will say parenthetically, in Fresno, where two of the five I defended there were acquitted, but the Judge says, "No, I have written three opinions in the last two weeks, I am not going to write them up." So one of the quotations I give will have to be from unreported cases, but I can say this. These little slip sheets that I have were prepared by the General Counsel of

Jehovah's Witnesses. He is the man who has appeared before [8A] the Supreme Court more than any other lawyer in private practice and he is one hundred per cent reliable. There has never been any question about the exactness, and many of them have certificates of a reporter after them.

Now, here is what the Court said here. This was Judge Picard, Frank A. Picard. Here is what he said:

Mr. Karesh: May I interrupt a minute, Counsel, and ask when it was that decision was made?

Mr. Tietz: September 13th, 1951. In other words, under the 1948 Act. The 1951 Universal Military Training and Service Act didn't change the situation in any way that affects this particular point.

> "Then his case came before a Hearing Officer, Mr. Canniff, and here is what he says":

and to me this is significant. He concludes:

> "The fact that registrant originally based his claim of exemption on the ground that he was a minister of the gospel and afterwards changed his reasons for exemption maintaining he did not consider himself a minister as his faith was not strong enough clearly indicates his uncertainty and doubts about his religious beliefs."

And the Court says:

> "But that isn't true at all because a man doesn't feel that he is a minister doesn't mean that [8-B] he doesn't believe in that cause. As I

> told Counsel before you came in, I have known people who have entered the seminary to become a Catholic priest, and after they have been there they said. 'Wait a minute, I don't belong here as a Catholic priest,' and they have left the seminary and gone out and they are good Catholics."

And the Court goes on to point out that the Hearing Officer was wrong, and I say here on that one point the Hearing Officer was wrong.

The Hearing Officer was wrong legally on another point. His assumption is one that is very widely expressed. There is no basis in law for it. His assumption is this: That in order for a registrant to qualify for a conscientious objector classification he must be a pacifist. He must be willing to abstain from any force, any violence or any participation.

That isn't what the law says. The law may come to that just like the 1940 Law was written, shall I say so loosely—that isn't true, but say loosely that Judge Learned Hand in the Second Circuit was able to say in a very outstanding opinion that:

> "This man who has no religious training, no religious beliefs, in the ordinary sense he is what is called a philosophical objector. He has religion as much as most people have and thereby is within the [9] terms of the law."

So in 1948 Congress very specifically said, "Put in the Supreme Being Clause" and specifically by words it said no philosophical beliefs, no economic

grounds, some sociological grounds, no political grounds. The point I am making is they did not say you have to be a pacifist.

Just by way of illustration, in Great Britain a man can be considered a conscientious objector, and the appellate tribunal has upheld the local tribunals, when the basis for his conscientious objection has been Welsh Nationalism, Scottish Nationalism. In other words, if they found he was genuinely and sincerely a conscientious objector they felt that these other things came within it.

I am not saying we should have this here, I am saying up to this minute we don't say that a man must be a pacifist so that when the Hearing Officer bases his sole reason for this refusal upon these grounds, he made a mistake.

Now I wish to cite very briefly another District Report to the Court.

This is United States versus Everngam. Fortunately this one is reported at 102 Fed. Suppl. 128, and I will read a paragraph from Page 130.

> "The report and recommendation of the Hearing Officer denied the defendant the right to be classified as a conscientious objector because he was [10] a Catholic, and was therefore arbitrary and invalid. The Appeal Board considered this invalid report and recommendation in making his subsequent classification of defendant, in which he was denied classification as a conscientious objector and placed in Class 1-A, thereby making the classification, thereby

making the classification of the Appeal Board and the subsequent Induction Order invalid. The aribtrary report and recommendation of the Hearing Officer was a denial of due process of law."

what the Hearing Officer overlooked was that the 1940 and '48 is contrary to the 1917 law and didn't say that you have to belong to a historic peace church. It says each man shall be judged on his own basis, and the Hearing Officer probably didn't know that in the Civilian Public Service camps of World War II, where the individual who had what was then called 4-E, it is now called 1-O, the complete conscientious objector classification, the Selective Service records say that there were 162 Catholics in there. So that apparently an individual can come from a Catholic background if his own beliefs are for conscientious objection to war.

Now, your Honor, I will go to my second point. The second point is that Page 26—I believe it is—of Exhibit 1 which is the summary of the Personal Appearance Hearing of this registrant before the Board shows that their consideration [11] of the case was tainted by prejudice, tainted by a misconception of what they were to consider.

Now, when I say it was tainted by prejudice I don't mean it was so serious that they called vulgar names or anything like that, but I do say that they had ideas which didn't belong in their consideration and here is where it shows very clearly. Mr. LaRue was the Board Member that did most of the questioning.

> "Mr. LaRue: The Board must be convinced that the registrant qualifies to be classified as a conscientious objector."

So far that is a hundred per cent correct, and then he makes this statement immediately after that which shows his state of mind, and a common state of mind.

> "It is true that a Jehovah's Witness will not salute the flag of the United States?"

And the boy says:

> "That is so."

Now, what has that to do with being a conscientious objector? It has a lot to do with the attitude of the Board Member, this Board Member, and perhaps many, I can see that. Just like Judge Picard said in this very same decision. I will read a part here because it is so appropos sometimes when so many of these decisions have so many applicable points.

> "And now, the fact that this man won't salute the flag makes my blood boil; and that he won't fight [12] for his Country also makes my blood boil. But that hasn't anything to do with this, with you and me. I am the Judge; I have got to follow the law as it is in making a decision—not my natural tendencies, because he probably would have been in jail a long time ago if I had been permitted to follow my natural tendencies."

And then at the end, and I will bring it up in connection with another point, he points out that that has nothing to do with conscientious objector.

Now, the Niznik case in 184 Fed. 2d and the Kose case, both reported cases bear on that point, too. The second Niznik case in 184 Fed. 2d 972. I might state, your Honor, that if your Honor would want a memo later I will be very happy to write it up that way.

Now, my third point is a rather interesting procedural point. I meet a varied reception with these points, so I never know what appeals to any particular court. This one I have in the Court of Appeals right now.

I might say that Judge Ben Harrison first thought it was altogether all right, and then he said:

> "Well, in order to get this decided I will convict him and put him out on bail."

which is something he doesn't do. So we are up there now, unfortunately an expense to the parents. [13]

The order to report for induction—I don't have the pagination, but there is only one in this file. Selective Service Form No. 252 has a grave defect. In understanding why I say that there is a grave, and in my opinion a fatal defect, we must keep in mind the regulations.

At all times concerned—and I might say at all times, both before and after, because this is one of the few—these two regulations I am going to quote are among the few regulations that haven't been

changed. The others change very rapidly. Section 1604.59, signing official papers.

> "Official papers issued by a local board may be signed by the Clerk of the local board if he is authorized to do so by Resolution duly adopted and entered in the minutes of the meeting of the local board, provided that the Chairman or a member of the local board must sign a particular paper when specifically required to do so by the Director of Selective Service."

Section 1606.51:

> "Forms made part of Regulations. (a) All forms and revisions thereof referred to in these or any new additional regulations or in any amendments to these or such new additional regulations and all forms and revisions thereof prescribed by the Director of Selective Service shall be and become a part of these [14] regulations in the same manner as if each form, each provision therein and each revision thereof were set forth herein in full.
>
> "Whenever in any form or in any instructions printed thereon any person shall be instructed or required to perform any act in connection with such, such person is hereby charged with the duty of promptly and completely complying with said instruction or requirement."

Now, of course that was made to make the registrant do things, which is perfectly proper. The

Draft Boards must obey the law, too. Now, Section —I don't have the Section now at the moment, but I can get it—I am looking for the Section which refers to the Order to Report for Induction.

Well, I will pass on and if there is any question about it in Mr. Karesh's mind, I will dig it up in another minute. I don't know why it isn't in my notes, but that Section says this: It is one of the few sections that says anything like this, probably the only one that says it precisely like this.

> "The Order to Report for Induction shall be prepared in duplicate."

It doesn't say a carbon copy, it says: "shall be prepared in duplicate," and a duplicate copy placed in the file.

Now, the purpose for that, of course, is that the Board— [15] or in a case like this where there is a prosecution of the Government—can show that the law was complied with. I say there is a failure of proof to show that a Board Member signed the Order for Report for Induction.

Now, that is my argument in brief on that. Look at the copy in the file, the proof is offered to convict this young man and you find that it is blank. Now, those things happen, clerks are busy——

The Court: Is there any signature at all on the order?

Mr. Tietz: No, sir, there is a typewritten name underneath, underneath the line, and it says: "L. F. MacDonald"; no ink signature whatever or no handwriting, no holographic matter.

Now, my fourth point is this: That there is no basis in fact for this classification and it is arbitrary. It is elementary, the estep decision of the Supreme Court, Cox vs. United States, decision of the Supreme Court, point out there must be a basis of fact for every classification. I will take just a moment on that so there is no mistake about my point.

The draft boards of Selective Service System can't pull a classification out of a hat. They can't say: "We don't like him on general principles." They can't say, "We need to fill our quota" which, all those things may be true.

They have got to have a basis in fact. Now, it is easy enough to find a basis in fact in most cases, but I say that [16] there is no basis in fact here, and I will cite some cases which show where the Judge said to the United States Attorney:

> "Show me where there is a basis of fact for the classification here."

Now, when we look at this file, this Exhibit 1, we see that at the very first opportunity the classification question, Page 7, although paginated, I think that Page 10 file, he signed Series 14. Series 14 in brief is this: "If you are a conscientious objector sign here." He did. Then they sent him another form, elaborate form that is called, "Special Form for Conscientious Objectors." They are Selective Service Form No. 150. When you read that you will find nothing in that, in my opinion, that would justify refusing him the 4-E, and certainly nothing

to refuse him the 1-AO. Nothing to show there: "You are a 1-A." You will find in the file that 32 people signed an affidavit in his behalf. You will find that all his letters ring true. And I say there will be nothing whatever against him in the file except that one point, that the Hearing Officer—remember, this is long after the local board classification, and my statement right now is that there is a great many cases that hold that a registrant is entitled to due process of law, to fair treatment at every level of the Selective Service System.

Long before the Hearing Officer dug up the point which may or may not be a point—I say it isn't—that he would [17] work in a Naval shipyard, there was no basis in fact. They just arbitrarily decided against him.

Now, with the Court's permission, I will read a paragraph from another unreported case, the Konidess case. This was United States of America vs. Stephen Konidess in the United States District Court of New Hampshire, Criminal Number 6216, decided at Concord, March 12th, 1952. The Judge was John C. Clifford, Jr. The Court said:

> "It is not the duty of this Court, as already indicated by me, to weigh the evidence as the cases are being presented in novo. The defendant has been consistent throughout in his claim that he is a conscientious objector, objecting to both combatant and non-combatant service. He has supported his position in this respect with facts presented to the local draft board, and

> which facts constituted the findings of fact by the Hearing Officer in his report. There is nothing in that report that indicates that the claim of the defendant——"

here is where we part a little bit——

> "There is nothing in that report that indicates that the claim of the defendant as a conscientious objector to combatant service as well as non-combatant service is false.
>
> "Although there is nothing in the reports of the [18] local board and Hearing Officer to indicate findings contrary to the contention and the facts as set forth by the defendant, the local board nevertheless classified him as 1-AO thereby rejecting the defendant's claim with respect to non-combatant service as indicated.
>
> "It is the conclusion of this Court that the Government has not sustained its burden in proving the guilt of this defendant as charged in the indictment."

Now, another much shorter paragraph in the Kobil case that I have mentioned before and I will be through with this point. This brings in a very nice distinction and very parallel to what we have here.

> "This young man couldn't qualify as a minister, under the Regulations of Congress."

And I admit that is true here. This young Jehovah Witness couldn't qualify as a minuister. He could

qualify as a minister in the Jehovah's Witnesses, but that isn't enough and for the purpose of this argument I will concede that.

The Court goes on to say:

> "I have searched this record. I have asked counsel to point out to me one thing the Board had before it besides the natural prejudices and its capricious manner which I can understand, too, being of the type I am. It is very difficult for me to tell you what [19] I think you ought to do and must do, but it was absolutely without any basis in fact and there was no right for this draft board to classify him as 1-A. What they should have done, in my opinion, is to make further inquiry that gives them that right."

Now, it is true, your Honor—your Honor probably has a number of these matters and you know that the Selective Service System hasn't waked up to the fact that if they bring these young men as they have a right to and without counsel, and by putting questions to them they can corner them on certain things about use of force, self-defense which may be a basis perhaps; certainly it gives them a debatable basis, but that wasn't the fact in this case.

My sixth point is this, and I merely state this point for the record because unfortunately the Court isn't in any position to rule on this matter. My point is what I will call the Nugent case point, that this file shows an absence in it of the Federal

Bureau of Investigation investigative report, and so that the Court will understand why I said that, your Honor—why I said that your Honor isn't in a position to rule on it, I will state this very briefly, then I will be through with my whole argument upon this one motion.

In the Second Circuit the conviction of a boy named Nugent was reversed on the point that his file didn't have in it the FBI investigative report. The Government sat certiorari, it was admitted and it was argued to the Supreme [20] Court on May 4th.

While that was going on I seized on that in a case that I had called the Elder case, which is now not unreported, but it is in the advance sheets and this Court, Ninth Circuit, said although appellant didn't even hint of this point during the course of the trial, we think in fairness because of the present posture of the case we will consider it. And then they said:

"We disagree with the Second Circuit,"

so I am merely stating this for the record.

Your Honor, I fear, isn't in a position to rule on that particular point, but I, of course, am hopeful that the Supreme Court will affirm the Nugent Case.

Mr. Karesh: May it please the Court, as your Honor knows, your Honor is very familiar with this type of case. The defendant is not entitled to an acquittal unless there is shown to be some substantial denial of due process. I think the late Judge

St. Sure said that he would have to be deprived of a substantial Constitutional right. He said it in the Habeas Corpus case of Colt vs. Hoyle.

Now, if there is no basis in fact whatsoever, of course, the 1-A classification is invalid and induction order predicated thereon is void and the man would be under no obligation to comply with the order of induction.

We will show that there is a basis in fact where this [21] particular case for this classification accorded to the registrant. So far as the denial of the procedure of due process is concerned, if a man were denied a personal appearance, for example, that would constitute a denial of procedural due process; or if, for example, a man had a personal appearance and said something different than that which had heretofore been furnished in his file and a summary did not go to the Appeal Board, that might be considered a procedural denial; or a man was not permitted an appeal.

But under every other circumstance, if there is any absence of certain procedures, it cannot be said to constitute a denial of procedural due process.

For example, the argument that the failure to place the name of the Chairman or member of the Board on the duplicate order would constitute a substantial prejudice seems to me would be to exhalt a technicality to a Constitutional level.

Now, I recall in a case before his Honor, Judge Carter, on a Habeas Corpus case arising in these courts, counsel said that the failure of the classifi-

cation card to show the signature of a board member invalidated the classification. Judge Carter brushed that aside. I can't understand the distinction between a carbon copy and a duplicate. In my opinion —maybe I am wrong, but a duplicate is a carbon copy, but so far as that is concerned, your Honor, I don't believe we have to labor the point at all. [22]

I would call your Honor's attention to the fact that the burden is not upon the Government to show that the defendant is not entitled to his classification. The burden is upon the registrant.

Draft boards are not in the nature of courts of law. There is a presumption first of regularity in their actions, and as the Regulation says, your Honor, in Class 1-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided that he is eligible for classification in another class. So the burden is upon him.

While this is a criminal trial, nonetheless, the burden is upon him so far as the L-A classification is concerned to show that he was entitled to a classification other than that. Now, all we have to do, if your Honor please, is to have some basis in fact and counsel challenges the so-called basis in fact which we will show now exists.

What is the basis in fact?

One: A man who is willing to work in a shipyard to create the instrumentalities of war certainly is not conscientiously opposed to participation in war in any form. Any man who is willing to work in a shipyard and get paid for creating the instrumen-

talities of war is not entitled to a conscientious objector classification.

A man in a conscientious objector classification, according [23] to the regulations, must be conscientiously opposed to participation in war in any form. I am not speaking of the 1-AO. I am speaking of the 4-E, now the 1-O, and I reiterate and I emphasize, any person willing to work in a shipyard and create the instrumentalities of war is not entitled to that classification.

Now, counsel, in effect, conceded that if we could show the man would use force in one form or another that that might constitute a basis in fact, and he says, "You can't find it." He alludes to the hearing before the local board, and nowhere there does the registrant say that he would use force. However, counsel forgets that in the conscientious objector form which the registrant filled out and which was before the local board as well as before the Board of Appeal—and this is now Photostatic No. 14 of the C.O. Form, it says:

> "Under what circumstances, if any, do you believe in the use of force?"

And he says:

> "I believe in self-defense if anyone attacks me to do bodily harm."

All right, now there is a judge in Minnesota—I think it is in Minnesota, United States versus Camp, I think, is the case and I can present it, said that if anybody is willing to use force of any kind

he is not conscientiously opposed to participation in war in any form. [24]

Now we come to the question of the prejudice of the local board. I say that if you read the hearing before the local board, quite the contrary, that hearing doesn't disclose any prejudice whatsoever. Now, in relation to the 1-AO classification, it must be remembered that the registrant told the local board that he didn't want it anyway, he wouldn't accept it. The local board had before it, "Shall we give him the 4-E now, the 1-O, or shall we place him in 1-A?" At that time they had seen the person—and, your Honor, they could look at the person if they wanted to; they could judge him; they could decide whether he was or was not sincere. They could pass upon his credibility.

Well, the local board said, "We will put you in 1-A." Now counsel says that the local board was prejudiced and he infers that if the local board was prejudiced, regardless of what happened before the Board of Appeal, that would invalidate the classification and recites the Niznik case. This Circuit Court very wisely isn't paying any attention to the Niznik case.

There is the case of Tyrrell vs. United States affirming a judgment which was rendered before his Honor Judge Roche in which they said—this Court said and reiterated a previous finding that when you have an appeal board decision anything that went on before the local board is immaterial. It is obvious, your Honor, why we have appeal

boards for [25] situations such as counsel says exist here, but I would add there isn't any prejudice before the local board and there wasn't or isn't any prejudice before the Board of Appeal.

Now, Counsel says that the Hearing Officer made some mistake; he made an error—I think he said an error in law and therefore that tainted the subsequent decision of the Board of Appeal. Why, as your Honor knows, the decision or the finding of the Hearing Officer is merely advisory. It is not mandatory.

Even if he made a mistake, there is nothing here to show that the Board of Appeal made a mistake. All we do is look in the file and say, "(One) Is there a basis in fact?" Obviously there is the basis in fact, the shipyard and the use of force to defend himself personally.

Was there any procedural due process denied the registrant? Obviously not. We come to the last point, the question of the FBI report in the file.

Counsel has cited the Elder case. The Elder case —and this is the law in this Circuit until the Supreme Court overrules it, and I don't think it will—at least I am hopeful it will not, your Honor. The FBI report, according to the Elder case, does not have to be in the file. Therefore, on the basis of this file and on the basis of the evidence here we ask that that motion be denied.

Mr. Tietz: If I may be permitted a few moments to reply [26] to Mr. Karesh, I promise the Court I will try not to repeat myself in anything we go

into later. I will take up the points in reverse order while they are fresh in my mind.

Mr. Karesh made a point that the advisory recommendation of the Hearing Officer and the recommendation of the Attorney General are merely recommendations and that they are not binding on the Appeal Board. That is true. Here's how the Court in the Everngam case previously cited disposed of that matter, and I think it is very good. There are other cases, too, on it.

This is on Page 131:

> "It does not appear that any member of the Appeal Board felt himself bound by this report and recommendation, or how far, if at all, it influenced the decision of the Appeal Board, but that is not enough. The report and recommendation was transmitted to the Appeal Board to use as an advisory opinion, and was considered and used (as the Regulations require) by the Appeal Board in its subsequent classification of the Appeal Board. Under such circumstances the prosecution was bound to prove that such invalid report and recommendation of the Hearing Officer of the Department of Justice did not affect the decision of the Appeal Board or any subsequent decision of the local board. No such [27] proof was offered. And had such proof been offered, there is considerable doubt whether such proof would have cured the error, inasmuch as the Report and recommendation of the Department of Justice

is an important and integral step in the conscription process, for the protection of the registrant, as well as the Government."

Now, Mr. Karesh would have the Court to understand that I conceded, or substantially conceded, that the use of force would be a basis of fact. I respectfully say to the Court that I intended and made no such concession.

As a matter of fact, I argued at some length that pacifism was not a requirement for either of the two conscientious objector classifications, that a man could be like a Jehovah Witness, a fighter. They are not pacificists. If they are assaulted they will strike back, as you and I would. They are conscientious objectors on another religious basis, not as the Christodelphians and the Mennonites and Quakers and all the peace churches, besides 120 some other churches who have had these problems in their ranks. These others are Pacifists, but Jehovah's Witnesses are not and they don't have to be. The law doesn't require it, and perhaps never will.

Now a quotation of the late Judge St. Sure about a substantial constitutional right overlooks a point —maybe I [28] am just quibbling about words, but I want to make it clear that not only must there be a denial of constitutional due process—I will put it this way: A defendant doesn't have to show a denial of constitutional due process. He can show a denial of statutory due process. He can show a

denial of procedural due process, and that is what I think we have done.

Mr. Karesh: May I just say this——

The Court: Have you submitted your motion?

Mr. Tietz: The first motion, yes.

Mr. Karesh: I simply wish to say, your Honor, that in the pamphlets Jehovah's Witnesses will engage in what they call theocratic causes. In other words, what they call a War for God so they are not entitled to a conscientious objection.

The Court: The motion at this stage will be denied. These motions are applicable to both cases, are they?

Mr. Tietz: I wouldn't want to say that, your Honor, but I will say this: My mind isn't working that clearly now, but if in the next case any of these motions apply precisely, I will not take the Court's time except possibly for this, to point out that the facts may be different and stronger.

The Court: I will not foreclose you from that opportunity. We will take a short recess.

(Short recess.) [29]

Mr. Tietz: The defendant will take the stand.

WILLIAM EDWARD FRANKS

the defendant, called as a witness on his own behalf, sworn.

The Clerk: Please state your name, address and occupation to the Court.

A. My name is William Edward Franks. I live at 2021 West Pueblo, Napa, California.

(Testimony of William Edward Franks.)

Q. Your occupation?

A. Boilermaker's helper at Basalt Rock.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case?

A. Yes.

Q. You had a personal appearance before the local board on or about July 10, 1951?

A. Yes.

The Court: Give the number of the board, please, for the record.

Mr. Karesh: 19, isn't it?

Mr. Tietz: Board number 19.

A. Yes.

Q. Where is that board? A. Napa.

Q. When you appeared at that board for a personal appearance therein, did you have an attorney with you? [30] A. No, I never did.

Q. What are your beliefs on conscientious objection?

A. Well, my belief on conscientious objection is that as Corinthians, the first, second chapter, in the tenth verse—tenth chapter, rather, the third and fourth verses, states plainly that although we walk in the flesh we do not war in the flesh because our warfare is not carnal. Also in second Timothy, in the second chapter, and in the third and fourth verses, it states that we should be a good soldier for Christ's army and all of those that are engaged,

(Testimony of William Edward Franks.)

have made their dedication to Jehovah God to do his will, are in Christ's army and they will do his will to preach to the people of good will not to wage warfare of the flesh and kill, as the Bible states and commands all men not to do.

Q. You saw the part of Government's Exhibit 1, pages 43, 44, otherwise known as the hearing officer's report, did you not? A. I did.

Q. It states in there that you told him you would work in a naval shipyard; it states that, doesn't it? The hearing officer's report says you told him you would be willing to work in a naval shipyard?

A. That is what it says.

Q. What is the fact, what happened at the [31] hearing?

A. Well, the fact is that at the hearing I told him that I would work at a shipyard if it was not directly to warfare, and then he jumps to the conclusion or it was his misunderstanding that it would be a naval shipyard, whereas I said it would be a shipyard if it was not directly to warfare.

Q. At this personal appearance before the local board, which was, I believe, on July the 10th, 1951, did you come to that hearing with somebody to testify for you? A. I did.

Q. Who was that?

A. My brother-in-law, Everett Boerger.

Q. Was he permitted to enter and to speak or to testify on your behalf? A. No, he was not.

Q. Is he in Court today? A. Yes, he is.

Mr. Tietz: That is all. You may cross-examine.

(Testimony of William Edward Franks.)

Cross-Examination

By Mr. Karesh:

Q. Have you any idea what kind of shipyard would not be related to the war effort?

A. Well, not particularly, no. Any shipyard that would be building regular cargo ships or a ship that would be used as a little yacht or some nature of that sort.

Q. I think you said in your conscientious objector form [32] that you would use force to defend yourself, is that correct? A. Yes, I did.

Q. Would you use force to defend anybody else?

A. Only my family, if someone was breaking in my home.

Q. You would defend your family?

A. Yes. We have Bible help on that.

Q. What about somebody else's family?

A. Well, particularly, like a neighbor or something like that, no.

Q. You would defend yourself and your family against, personally, an attack? A. Yes.

Q. Would you defend another person's family against personal attack? A. No.

Q. Well, don't you consider it a higher form of religion to help others rather than to help yourself?

A. It is to help them with their belief and their understanding of the Bible and for God's purposes.

Q. Do you believe in going into what is called theocratic warfare, do you not?

(Testimony of William Edward Franks.)

A. That's right.

Q. That's the belief of Jehovah's Witnesses?

A. That's right. [33]

Q. And the pamphlet that you submitted to the local board, I think, contains that fact, does it not?

A. It does.

Q. What do you mean by theocratic warfare?

A. Theocratic warfare is not the warfare of a gun or of any nature to kill anyone. It goes to the nature of God's word, the Bible. It is theocratic warfare to the extent they tear down the things that the devil has put upon this earth and showing by the Bible that they are wrong and that God's Kingdom will be established for man's only hope.

Q. So you would engage in some kind of warfare if you believe it were God's warfare?

A. It would be preaching God's warfare, yes.

Mr. Karesh: That is all.

Mr. Tietz: That is all.

(Witness excused.)

EVERETT BOERGER

called as a witness for the defendant, sworn.

The Clerk: State your name, your address and your occupation to the Court.

A. Everett Boerger.

Q. Your address?

A. 1405 Vista Avenue, Napa. [34]

Q. Your occupation? A. Operator.

Q. What kind of operator?

A. Equipment operator.

(Testimony of Everett Boerger.)

Direct Examination

By Mr. Tietz:

Q. Do you know the defendant, William Franks? A. I do.

Q. How long and how well have you known him?

A. Well, I have known him since 1939 and '40 when I became acquainted with his sister.

Q. Have you had occasion to be with him much in the last ten or so years, twelve years?

A. All the time.

Q. Well, do you attend Bible studies and such things with him?

A. Yes. I attend two Bible classes a week with him and one Bible class we do not attend together inasmuch as he conducts one Bible study and I conduct the other in different places.

Q. Do you know the difficulty he had in the public schools about the flag salute?

A. Yes. He was expelled from a number of schools in the City of Napa and had to go from one to another to be permitted to go to school. [35]

Q. You know that he has been a staunch Jehovah Witness for many, many years?

The Court: How many years?

Q. (By Mr. Tietz): How many years has be been a member?

The Court: To his knowledge.

A. I became acquainted with the work in 1939 and he was then in 1940 expelled from school and has been ever since——

(Testimony of Everett Boerger.)

Q. (By Mr. Tietz): Because of his belief as a Jehovah Witness in the flag salute situation?

A. That's right.

Q. That goes back at least to that, is that right?

A. Yes.

Q. Do you know of other work besides conducting and attending Bible studies that this defendant has done in connection with his religious work?

A. He conducts Bible studies and he has enrolled in the Theocratic Ministry school.

Q. What does that mean?

A. Where we learn to become more able and efficient in presenting the gospel of the good news to the people throughout the earth, being better trained to go forth.

Q. What classes or what time does that take?

A. At Napa we hold the Theocratic Ministry school every Thursday evening, and it consists of an hour each week. [36]

Q. Is that in addition to these Bible studies that you mentioned? A. Yes.

Q. In other words, it is in addition to the Bible studies? A. That's correct.

Q. Do you know of any work that Bill has done in publishing? A. Yes.

Q. What does that mean, publishing?

A. Publishing means to go from door to door preaching, as we are commanded, and he has participated in that each week.

Q. That in addition to all these other things?

A. Yes, that's right.

(Testimony of Everett Boerger.)

Q. Do you know whether he does it regularly or just once in awhile?

A. Yes, he does it regularly.

Q. When you say regularly, do you mean every week of the year? A. Every week, yes.

Q. About how many hours every week, in addition to these other things that he does?

A. A week?

Q. Each week.

A. Each week on the average of—well, I would say, well, it would be 20 hours a month—about five hours a week. [37]

Q. I believe you served four years at Steilacoom as a Jehovah Witness, is that right? A. I did.

Q. Have you ever discussed conscientious objection with this defendant here today?

A. Yes, we have talked about it.

Q. Often?

A. Well, not often, but we discussed it to thoroughly understand how each of us felt.

Q. Do you know how he feels about it?

A. Yes.

Q. Now all these things I have been asking you about, are these the things that you were prepared to tell the local board at this personal appearance hearing on July 10, 1951, if you had been permitted to come in and tell them what you knew about him?

A. Yes.

Mr. Tietz: You may cross-examine.

(Testimony of Everett Boerger.)

Cross-Examination

By Mr. Karesh:

Q. The Jehovah Witnesses is not a pacifist organization, is it? A. No.

Q. The Jehovah Witnesses sect has no prohibition against a person going to war if that person wants to go to war?

A. It is his own personal—— [38]

Q. It is his own conscience? A. Yes, sir.

Mr. Karesh: That is all.

Mr. Tietz: That is all. One further question.

Redirect Examination

By Mr. Tietz:

Q. If one of the Jehovah Witnesses either enlisted or permitted himself to be drafted into any national army, secular army, worldly army, would he still be one of Jehovah Witnesses?

A. It would be entirely up to the individual himself.

Q. You mean that he could engage in carnal warfare and still be a devout and a follower of Jehovah Witnesses? A. No.

Mr. Tietz: That is all. Thank you.

Mr. Karesh: No questions.

The Court: I would like to ask a couple of questions.

Examination

By the Court:

Q. In the light of your earlier testimony con-

(Testimony of Everett Boerger.)

cerning the fact that a person, although a Jehovah Witness, would undertake to serve the armed forces as a matter of his own personal concept——

A. Yes.

Q. ——mindful that you said "yes," how do you reconcile your last statement that if he did enter the services it would be inimicable as a Witness, how do you reconcile [39] those two statements?

A. He couldn't conduct himself in it, according to the scriptures, if he carried on a part with the world. He has to make a decision as to whether he is going to serve the Creator or serve in the armies of the nations.

Q. Within the areas of your own organization, there is no proscription—I mean by that, no prohibition against the individual exercising his own judgment as to the entry into the armed services, is there? A. No.

Q. And there is no mandate upon the part of any higher authority which might be exercised upon the individual, is there, in that respect—no mandate, no compulsion from any higher authority from within the Witnesses themselves? A. None.

Q. So, as I understand your testimony then, the individual looks upon the problem of the entry into the armed services as a specific individual problem?

A. That's right.

Q. Disassociated from the question of his activities in this religious sect, am I correct in that?

A. Yes.

The Court: I think I understand. Thank you, very much.

(Witness excused.) [40]

Mr. Tietz: Now, your Honor, I think Mr. Karesh and I have an understanding on a final point, that it was not necessary for me to issue a subpoena to the agent in charge of the Federal Bureau of Investigation office, and I believe Mr. Karesh has all the F.B.I. investigative reports made of this defendant, William Franks, with respect to his conscientious objection to war; that these are the reports that were given to the hearing officer of the Department of Justice for his use, and that they were used by him; that they are not in his file; and that we had no opportunity to know the informants or the exact statements that they made; that they did have an opportunity to have a general character given but not the names of the informants.

Now, Mr. Karesh, that is our understanding, is it not?

Mr. Karesh: Yes. I gave counsel the understanding that rather for him to go to the trouble of issuing a subpoena for the files, I would have them, but I told counsel in my letter, and I think he will bear me out, that the mere production, to obviate him going to the trouble of getting a subpoena for the production of those reports, we would vigorously resist. Now, if he is prepared to make the demand, I will be prepared to argue why we should not produce them.

Mr. Tietz: Yes, we are asking that they be admitted in evidence. That they be first marked so that we will know [41] just what we are talking about.

Mr. Karesh: No, I am not required to ask that they be marked for identification.

Mr. Tietz: Well, I want to be able to talk about the precise thing. You have them here, have you not?

Mr. Karesh: I may have them here, yes. I said I would have them here, but I feel I don't have to produce them under the authority in the Elder, Elder versus the United States. I will leave the decision to your Honor. This is the law of this Circuit.

Mr. Tietz: That is of a different point, your Honor.

The Court: Why not make your record on the point first, so that I can focus my attention on the point?

Mr. Tietz: I am no longer arguing the Elder point, which is the Nugent point.

(Further argument presented.)

The Court: Now, I have several matters to rule on. I have the matter of the production of the F.B.I. report and file.

Mr. Karesh: Under instructions, we can't produce them, Judge.

The Court: You enter an objection to the request?

Mr. Karesh: Yes.

The Court: The Court rules on the objection and sustains the objection. [42]

What are the other matters before me to rule upon?

Mr. Tietz: I would like to cite two matters that are right in point with the matter that the Court has been discussing with Mr. Karesh. In this Cobell case, Judge Prickard had this to say (citing). Now another Court took the same attitude and that's Judge Joyce, in the Greason case. This is United States District Court, District of Minnesota, decided in Minneapolis, November the 30th, 1951 (citing).

(Further argument.)

The Court: I will permit you to file a memorandum, counsel, of authorities.

(Further discussion between the Court and counsel.)

The Court: Is the record now in such condition, gentlemen, that these points may be reviewed? Are your points thoroughly noted in the record, counsel?

Mr. Tietz: I will state this for the purpose of the record, on behalf of the defendant Franks, I repeat, as if I fully stated again, the five grounds for a judgment of acquittal——

The Court: You might repeat them for the record, just in summary form.

Mr. Tietz: The hearing officer advisory opinion and the attorney general's recommendation was based on illegal reasoning. [43]

Point number 2 was the summary of the personal appearance hearings shows that prejudicial attitude on the part of the board.

Point number 3 is that there is a defect in the proof in that the duplicate that is in the file in Exhibit 1 of the order to report for induction, Selective Service Form 252, is a blank. It is unsigned.

The fourth point was and is that there is no basis in fact for the classification. It was arbitrary.

The fifth point is that the file shows that there is no—that the F.B.I. Investigative Report is not in it.

The Court: I ruled on the last point.

Mr. Tietz: Yes, sir.

Now, the points that I have made at the present time are as follows: The hearing officer's report is factually incorrect in that the hearing officer said that he said he worked or would work in a naval shipyard and the testimony, uncontradicted, is that he said he would work in a shipyard but not a naval shipyard. And on the basis of the Leland case, which is a recent Ninth Circuit Case, the court there pointed out that it goes without saying that a hearing officer's opinion can be factually incorrect and therefore it can be—it can vitiate the proceedings.

The next point was that the local board refused to hear [44] his sole witness, Everett Boerger, who had further evidence to present, evidence not in the file.

And the next point and last point, was that the defendant believes he should have the advantage of

the F.B.I. investigative report in the presentation of his defense here in a criminal proceedings.

The Court: Then the case of United States versus William Franks is submitted.

[Endorsed]: Filed November 2, 1953. [45]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Attorney for the appellant:

Indictment.

Waiver of Jury Trial.

Order Denying Motion for Judgment of Acquittal.

Judgment and Commitment.

Notice of Appeal.

Extension of Time.

Designation of Record.

1 Volume of Testimony.

Plaintiff's Exhibit No. 1.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 2nd day of November, A.D. 1953.

[Seal] C. W. CALBREATH,
Clerk;
By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 14114. United States Court of Appeals for the Ninth Circuit. William Edward Franks, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed November 2, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14114

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Appellant will rely upon the following points in the prosecution of his appeal from the judgment entered in the above-entitled cause.

I.

The classification on the appellate level was based on misconceptions of the law, namely, that only pacifists can qualify for conscientious objector classifications and that a willingness to work in a naval shipyard disqualifies a registrant for a I-A-O classification.

II.

Prejudice and/or ignorance of the law colored the classification action at the local board level.

III.

The classification action at all levels was without basis of fact.

IV.

Appellant should have been permitted a de novo trial of all issues.

V.

The uncontradicted evidence shows there is no factual foundation for believing that appellant is or ever was willing to work in a naval shipyard.

VI.

New and further pertinent evidence was available at the local board hearing but the board arbitrarily refused admission to the witness, Everett Boerger.

VII.

The court erred in refusing admission of the F.B.I. reports, or permitting the defendant to inspect them.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 9, 1953.

No. 14114

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division.

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York
Counsel for Appellant

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No. 14114

United States Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division.

JURISDICTION

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. The appellant was sentenced to the custody of the Attorney General for a period of eighteen months. [5-6][1] The district

[1] **Numbers appearing in brackets herein refer to pages of the printed Transcript of Record filed herein.**

court made no findings of fact or conclusions of law. No reasons were stated by the district judge orally for the judgment rendered. Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. The indictment charged an offense against the laws of the United States. Appellant was charged with refusal to submit to induction contrary to the provisions of the Universal Military Training and Service Act. [3-4]

This Court has jurisdiction of this appeal under Rule 27(a) (1), (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. [7]

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act. [3-4] It was alleged that appellant registered with Local Board 19, Napa County, California. It is alleged further that he was finally classified in Class I-A, making him liable for military training and service. It is then alleged that he was ordered to report for induction. [3-4] The indictment then concludes that appellant did "knowingly refuse to submit himself to induction and be inducted into the Armed Forces of the United States as provided in the said Act, and the rules and regulations made pursuant thereto." [4]

Appellant was arraigned and pleaded not guilty. He waived the right of trial by jury. [9] The case was called for trial on May 22, 1953. [8] Evidence was heard and arguments were made on the motion for judgment of acquittal. [10-50] The motion for judgment of acquittal was denied. [36, 50] The court found appellant guilty as charged in the indictment. [5-6] Appellant was sentenced to the custody of the Attorney General for a period of eighteen months. [5-6] Bail was granted pending appeal to this Court. Notice of appeal was timely filed and the transcript of record, in-

cluding statement of points relied on, has been duly filed. [52-53]

THE FACTS

Appellant was born on April 26, 1932. [F. 1][2] He registered with his local board on April 27, 1950. [F. 2, 3] The local board mailed to him a classification questionnaire on April 30, 1951. [F. 4, 11]

Franks filed his questionnaire with his local board on May 10, 1951. [F. 4] He showed his name and address and stated that he had no previous military service. [F. 5, 6] He answered that he was a student preparing for the ministry under the direction of the Watchtower Bible and Tract Society, the legal governing body of Jehovah's Witnesses. [F. 6] He showed that he was single and employed as a general laborer for Millage & Walker in Napa, California. He showed that he had been working at this job since February, 1951. [F. 7] He stated that the other business that he pursued was preaching. [F. 8]

The appellant showed that he had attended six years of elementary school and three years of junior high school. He stated that he did not attend high school but quit school when he completed junior high school. [F. 9] He showed the board that he was then pursuing the Course in Theocratic Ministry at a school conducted by Jehovah's Witnesses. [F. 9]

Franks signed the conscientious objector blank appearing on page 7 of the classification questionnaire. This is Series XIV of the questionnaire. [F. 10] He claimed classification as a conscientious objector. He asked the board to place him in Class IV-E. [F. 10]

Accompanying his questionnaire was a letter in which

[2] **Numbers preceded by "F." appearing herein within brackets refer to pages of appellant's draft board file, Government's Exhibit 1, a file of photostatic copies of papers filed in the cover sheet of Franks. At the bottom of each page thereof appears an encircled handwritten number that identifies the page in the draft board file.**

he explained to the board that he was a conscientious objector. In this letter he requested that the board supply him with the special form for conscientious objector that he had signed for in Series XIV on page 7 of the questionnaire. [F. 12] The local board gave to Franks the conscientious objector form on May 10, 1951. [F. 13]

Franks filed the conscientious objector form on the same day that it was given to him by the local board. [F. 13] He signed Series I (B). In this he certified that he was opposed to participation in both combatant and noncombatant military service. [F. 13]

Franks answered that he believed in the Supreme Being. He then described the nature of his beliefs in religion forming the basis for his conscientious objections to war. [F. 13] He showed that he believed in Jehovah, the Almighty God. He answered that he gave all of his allegiance to the Kingdom of Almighty God. In his conscientious objector form he showed that he was an ambassador for the Lord Jesus Christ and, as such, preaching the gospel of God's kingdom as the only hope for mankind. He showed that he maintained a position of strict neutrality with respect to the wars of this world and would have absolutely nothing to do with them as a soldier. [F. 15-16] He showed that he had been reared as one of Jehovah's Witnesses by his parents. He informed the board that he had been studying the Bible and had been trained as a conscientious objector since the age of seven. [F. 14]

He named the Watchtower Bible and Tract Society and its president, Nathan H. Knorr, as the persons upon whom he relied for religious guidance. [F. 14]

Franks showed that he believed in the use of force only in self-defense. [F. 14] He showed that he regularly attended meetings and that such, together with his preaching activity, proved the depths of his convictions and the consistency of his belief. [F. 14] He said that he had given public expression to his conscientious objections. [F. 14]

The schools that Franks attended were listed. He then

showed his employers and his places of residence. [F. 14, 15]

Franks showed that his parents were Jehovah's Witnesses. He then proved that he was a member of a religious organization known as Jehovah's Witnesses of which the Watchtower Bible and Tract Society is the legal governing body. He showed that he had been one of Jehovah's Witnesses since 1940. He named his church and the presiding minister thereof. [F. 17]

Franks showed that there was no official statement of Jehovah's Witnesses toward participation in war as far as others were concerned. He showed that Jehovah's Witnesses depended upon each one to read the Bible and Watchtower publications and take an individual stand upon learning the commandments of Almighty God. [F. 17] He then listed certain persons as references and signed the form. He referred to the booklet *Neutrality,* published by the Watchtower Bible and Tract Society, as a statement of his conscientious objections to participation in war in any form. [F. 19]

The local board on June 12, 1951, classified Franks as liable for unlimited military training and service. It rejected his claim for classification as a conscientious objector. [F. 11] Following notification of this classification Franks requested a personal appearance. This was granted. [F. 11, 21-23] He was notified to appear before the board on June 28, 1951. [F. 11, 24] He appeared before the board at the time and place appointed. The local board had a stenographic report made of the hearing. [F. 26-27] The local board at the close of the hearing considered all of the evidence and voted unanimously that Franks should continue to be classified in Class I-A. [F. 25] He was notified of this classification and appeal was made by Franks. [F. 11, 28-29]

The local board then ordered Franks to take a preinduction physical examination on October 9, 1951. He was thereafter on October 19th declared to be physically acceptable

to the armed forces for service. [F. 11, 30] The board then forwarded the file to the appeal board. [F. 11]

The appeal board on October 25, 1951, entered in its minutes that Franks was not entitled to be classified as a conscientious objector. This entry in the minutes made mandatory a reference of the case to the Department of Justice for an appropriate inquiry and hearing, as required by Section 6(j) of the act. [F. 11]

The case was referred to the Department of Justice. The Federal Bureau of Investigation conducted its appropriate inquiry and investigation. [46, 47] Following the completion of the investigation the case was referred to the hearing officer, together with the secret FBI investigative report. [41] The hearing officer notified Franks to appear before him on March 6, 1952. [F. 33] Franks appeared on the date and at the place appointed and a hearing was conducted. At the hearing he filed numerous affidavits and certificates, all of which corroborated the sincerity of his claim and the genuineness of his conscientious objections. [F. 35-39]

Following the hearing a report was made by the officer to the Department of Justice. The hearing officer reviewed the background of Franks. He then referred to the secret FBI investigative report which apparently supported the claim made by Franks. He then referred to the hearing and the testimony given by Franks. He referred to the testimony that Franks was a boilermaker in a steel plant engaged in the manufacture of steam pipes. He found from the record before him and the hearing that Franks was sincere and that his conscientious objections were genuine, except for the fact that Franks was willing to do defense work. In answer to a question propounded by the hearing officer, Franks said that he would be willing to work in a naval shipyard. [F. 41-44] Franks testified as to the exact statement that he made, which was that he was willing to work in a naval shipyard as long as such work did not directly pertain to warfare. [38]

The hearing officer then recommended to the Department

of Justice that Franks was not entitled to the classification as a conscientious objector because of his willingness to work in a naval shipyard. [F. 44] The Assistant Attorney General wrote a letter recommending the denial of the conscientious objector claim for the reasons stated by the hearing officer. The report of the hearing officer was adopted by the Assistant Attorney General. [F. 40]

The appeal board, after reviewing the entire file and the report of the hearing officer together with the recommendation of the Assistant Attorney General, on July 3, 1952, classified Franks in Class I-A. This classification rejected the conscientious objector status. It also made him liable for unlimited military training and service. [F. 31] The file was returned to the local board and Franks was notified. [F. 11, 45] Franks was then ordered to report for induction. The order issued on October 16, 1952. He was commanded to report on November 3, 1952. Franks reported on that date. He then refused to be inducted. [F. II-III] It was stipulated at the trial that Franks appeared at the induction station, completed the process and refused to submit to induction. [10]

QUESTIONS PRESENTED AND HOW RAISED

I.

The undisputed evidence showed appellant had conscientious objections to participation in both combatant and noncombatant military service. Franks showed that these objections were based on his sincere belief in the Supreme Being. He showed that his obligations were superior to those owed to the state or which arose from human relations. His beliefs were not the result of political, philosophical or sociological views. They were based solidly on the Word of God. [F. 10, 13-19]

The secret FBI investigative report and the report of the hearing officer establish that Franks was sincere in his conscientious objections to participation in combatant and

noncombatant military service. [F. 41-44] The hearing officer, however, recommended against the conscientious objector claim because appellant was willing to work in a defense plant. [F. 44]

The question here presented, therefore, is whether the denial of the claim for classification of appellant as a conscientious objector was arbitrary, capricious and without basis in fact?

II.

The Department of Justice found that appellant was sincere in his conscientious objections to participation in both combatant and noncombatant military service. The undisputed evidence showed that these objections were based on religious training and belief. The Department of Justice recommended against the conscientious objector classification because appellant was willing to do work in a defense plant. The Department of Justice recommended that appellant not be classified as a conscientious objector because of this. [F. 40, 41-44] The appeal board followed the recommendation of the Department of Justice and placed appellant in Class I-A. [F. 31]

On the trial of this case a complaint was made against the invalid recommendation by the Assistant Attorney General and the report of the hearing officer to the appeal board. [13-19] The motion for judgment of acquittal was denied. [36, 50-51]

The question here presented, therefore, is whether the report of the hearing officer and the recommendation of the Department of Justice to the appeal board were illegal, arbitrary, capricious and contrary to the act and regulations.

SUMMARY OF ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides for the classification of conscientious objectors. It excuses persons who, by reason of religious training and belief, are conscientiously opposed to participation in war in any form.

To be entitled to the exemption a person must show that his belief in the Supreme Being puts duties upon him higher than those owed to the state. The statute specifically says that religious training and belief does not include political, sociological or philosophical views or a merely personal moral code.

Section 1622.14 of the Selective Service Regulations (32 C. F. R. § 1622.14) provides for the classification of conscientious objectors in Class I-O. This classification carries with it the obligation to do civilian work contributing to the maintenance of the national health, safety, or interest.

The undisputed evidence showed that the appellant had sincere and deep-seated conscientious objections to participation in war. These objections were to both combatant and noncombatant military service. These were based on his belief in the Supreme Being. His belief charged him with obligations to Almighty God superior to those of the state. The evidence showed that his beliefs were not the result of political, sociological, or philosophical views. The file shows without dispute that the conscientious objections were based upon his religious training and belief as one of Jehovah's Witnesses. The appeal board, notwithstanding the undisputed evidence, held that appellant was not entitled to the conscientious objector status.

The denial of the conscientious objector classification is

arbitrary, capricious and without basis in fact.—*United States* v. *Alvies,* 112 F. Supp. 618; *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Pekarski,* — F. 2d — (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953); *Jewell* v. *United States,* — F. 2d — (6th Cir. Dec. 22, 1953).

POINT TWO

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his willingness to work in a naval shipyard) were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

The hearing officer and the Assistant Attorney General misinterpreted Section 6(j) of the act. Employment, type of work done or what a registrant claiming conscientious objection is willing to do is not made an element of the act. The conscientious objector status is unqualifiedly extended to all persons who are opposed to participation in combatant and noncombatant military service based on religious training and belief, flowing from obligations to the Supreme Being that are higher than those owed to the state. So long as a person meets the definition he is entitled to the classification. The type of work that he is willing to perform may not be considered in determining his conscientious scruples against participation in the armed forces.

Since the conscientious objector status is allowed to noncombatant soldiers, willing to participate in the armed forces as noncombatant soldiers, then, by force of the same reason, complete or full conscientious objector status is allowed to a person who is willing to work in a defense plant or naval shipyard.

Appellant was entitled to have his case determined ac-

cording to the definitions appearing in the act and regulations. It was incompetent and irrelevant for the Department of Justice to rely on fictitious, irrelevant, and immaterial standards as a basis for forfeiture of the claim as a conscientious objector.—*United States* v. *Everngam,* 102 F. Supp. 128 (W. Va. 1951); *Annett* v. *United States,* 205 F. 2d 689 (10th Cir. 1953); *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953); *United States* v. *Pekarski,* —F. 2d— (2d Cir. Oct. 23, 1953).

The recommendation of the hearing officer of the Department of Justice and the Assistant Attorney General to the appeal board was based on irrelevant and immaterial standards, thereby violating the act and the regulations.

ARGUMENT

POINT ONE

The appeal board had no basis in fact for the denial of the claim for classification as a conscientious objector made by appellant, and it arbitrarily and capriciously classified him in Class I-A.

Section 6(j) of the act (50 U. S. C. App. § 456(j), 65 Stat. 83) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service

because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participa-

> tion in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."—50 U. S. C. § 456(j), 65 Stat. 83.

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not based on "political, sociological, or philosophical views or a merely personal code," but that it was based upon his religious training and belief as one of Jehovah's Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah and dedicate his life to the ministry.

There is no question whatever on the veracity of the appellant. The local board and the appeal board accepted his testimony. Neither the local board nor the appeal board raised any question as to his veracity. They merely misinterpreted the evidence. The question is not one of fact but is one of law. The law and the facts irrefutably establish that appellant is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory evidence in the file disputing appellant's statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the appeal board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. The appeal board, without any justification whatever, held that he was willing to perform military service. Never, at any time, did the appellant suggest or even imply that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of military machinery.

The decision in *United States* v. *Alvies,* 112 F. Supp. 618, at pages 623-625, is applicable here. For the reasons there discussed the denial of the conscientious objector status here should be held to be without basis in fact.

The only conclusion that appellant can reach as to why the appeal board denied the conscientious objector status is that there was an erroneous interpretation of the law.

In appealing from the I-A classification Franks did not waive his conscientious objector classification. There is nothing in the file to so indicate.

Even when one has a conscientious objector classification given to him by the local board and appeals therefrom for Class IV-D he does not waive his conscientious objector status. It has been specifically held that such does not amount to a waiver.—*Cox* v. *Wedemeyer,* 192 F. 2d 920 (9th Cir.).

The denial of the conscientious objector classification is without basis in fact. (See *United States* v. *Konides,* No. 6216, District of New Hampshire, March 12, 1952, and *United States* v. *Konides,* No. 6264, District of New Hampshire, decided by Woodbury, Circuit Judge, S. D., on June 23, 1953.) Konides appealed to the President twice and received I-A twice. After each classification orders to report for induction were issued. Konides refused to be inducted twice. Each time an indictment issued. Each time the indictment was dismissed because of the arbitrary denial of the conscientious objector status by the President. (See also *Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky.); *United States* v. *Loupe,* Cr. No. 249-52, District of New Jersey, July 17, 1953; *United States* v. *Pekarski,* —F. 2d— (2d Cir. Oct. 23, 1953); *Taffs* v. *United States,* —F. 2d— (8th Cir. Dec. 7, 1953); *Jewell* v. *United States,* —F. 2d— (6th Cir. Dec. 22, 1953).) Copies of the *Konides, Loupe, Pekarski, Taffs* and *Jewell* opinions accompany this brief.

The documents filed by appellant showed that when ordered to take up arms and fight in Caesar's army of this world Jehovah's Witnesses raise their conscientious objections to quit worshiping and serving Jehovah and thereby render unto Caesar the things that are God's. They take this stand as ministers with conscientious objections notwithstanding the fact that they are not pacifists.

Their conscientious objection to rendering military serv-

ice to Caesar and in Caesar's army is based solely upon the commands of God's Word, the Bible, because they are his ministers or ambassadors for the new world of righteousness. (2 Corinthians 5:20) These are, therefore, conscientious objections to the performance of military service, that are based on Bible grounds. They are not pacifists. They are ministers conscientiously opposed to the performance of military service. "We know that we are children of God, and that the whole world lies in the power of the evil one." (1 John 5:15, *Weymouth*) They are, therefore, conscientious objectors and ministers, or ministers with conscientious objections.

There is no Scriptural authorization for Jehovah's Witnesses to bear arms in the service of the armed forces of any nation. Based on such training and belief Jehovah's Witnesses have conscientious objections to rendering such service. These objections are conscientiously based upon the law of Almighty God. That law, which is supreme, commands the true Christian minister to maintain an attitude of strict neutrality toward participation in international, national or local conflicts. This strict neutrality required by the supreme law is enforced by the commands of God, which prohibit Jehovah's Witnesses from bearing arms or joining the armed forces of the nations of this world.

The fact that entering "Caesar's" armed forces is usually by conscription or forced service does not make it Scriptural. Regardless of whether the service is voluntary or by capitulation to commands, the situation is the same: the Christian minister of Jehovah thus gets unscripturally involved in the affairs of the nations of this world. He who is a friend of the world is an enemy of God. (James 4:4) A Christian minister does not take a course of action that is at enmity with God. He must follow in the footsteps of the Lord Jesus Christ and keep himself unstained by the world. (1 Peter 2:21; James 1:27, *An American Translation*) This he does by faithfully sticking to his post of duty as a minister and ambassador of Jehovah. He does

not abandon it to participate in the controversies of this world of Satan.

It is true that Jehovah's Witnesses, as Christian ministers of God, reside in all the nations of the world. That fact does not mean that they are mixed up with the political affairs or the international controversies of such nations. They are in the world but not of it. Jesus prayed to his Father, "I have given your word to them, but the world has hated them, because they are no part of the world just as I am no part of the world." (John 17:14, 16, *New World Translation*) Jehovah, through Christ Jesus, has taken them out of the controversies and affairs of this world and drawn them into the exclusive business of preaching the good news of Jehovah's kingdom, and, as ambassadors to the nations of the world, carrying his warning message of the coming battle of Armageddon. "As for us, our citizenship exists in the heavens, from which place also we are eagerly waiting for a savior, the Lord Jesus Christ."—Philippians 3:20, *New World Translation;* John 15:19.

Jehovah's Witnesses must not entangle themselves in the affairs of this world. This is because they are soldiers in the army of Jehovah. "Endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this life; that he may please him who hath chosen him to be a soldier." (2 Timothy 2:3, 4) As such Christian soldiers they fight to get the message about God's kingdom to every creature.—Mark 16:15.

Jehovah's Witnesses fight lawfully as such soldiers with all of the legal instruments, such as the constitutional rights, the statutory rights and other lawful rights granted to them by the nations of this world. They fight for freedom on the home front of the nation where they reside. They fight to defend and legally establish the good news before courts, ministers, officials, administrative boards and other agencies of governments. (Philippians 1:7, 16)

They fight with weapons that are not carnal. These are the mouth, the faculty of reason, the process of logic and the law of the land. "For though we walk in the flesh, we do not wage warfare according to what we are in the flesh. For the weapons of our warfare are not fleshly, but powerful by God for overturning strongly entrenched things. For we are overturning reasonings and every lofty thing raised up against the knowledge of God, and we are bringing every thought into captivity to make it obedient to the Christ."—2 Corinthians 10:3-5, *New World Translation; Weymouth.*

In addition to the legal instruments that such Christian soldiers use, the great weapon that they wield among the nations of the earth is the "sword of the spirit, which is the word of God." (Ephesians 6:17) As soldiers of Jehovah and Christ they put on only the uniform that is prescribed by the law of God for Christian soldiers, his witnesses, to wear. That uniform is the armor of God. They have on the helmet of salvation and the breastplate of righteousness. They bear the shield of faith and wield the sword of the spirit, valiantly defending the righteous principles of Almighty God as commanded by the apostle Paul: "Put on the complete suit of armor from God that you may be able to stand firm against the machinations of the Devil, because we have a fight, not against blood and flesh, but against the governments, against the authorities, against the world-rulers of this darkness, against the wicked spirit forces in the heavenly places. On this account take up the complete suit of armor from God, that you may be able to resist in the wicked day and, after you have done all things thoroughly, to stand firm."—Ephesians 6:10-13, *New World Translation.*

Since they are in the Lord's army of gospel-preachers, they certainly have conscientious objections to serving in the armies of the evil world of Satan. As soldiers of God they cannot engage in the conflicts and warfare that flow from the affairs of this world. They cannot be in two armies

at the same time. Since they have been enlisted and serve in Jehovah's army as his ministers, they must be at their missionary posts of duty. They cannot leave such posts in order to take up service in some other army. To quit Jehovah's army and join the armies of Satan's world would make the soldiers of God deserters. Deserters are covenantbreakers. "Covenantbreakers . . . are worthy of death." (Romans 1:31, 32) The nations of this world cannot excuse Jehovah's soldier from the penalty of death prescribed by Almighty God for deserters from his army. Caesar, not being able to relieve him from his covenant obligations or violations thereof, should not command him to become a renegade and deserter from Jehovah's army to join his. That would result in his everlasting death. "And do not become fearful of those who kill the body but cannot kill the soul, but rather be in fear of him that can destroy both soul and body in Gehenna. Do not be afraid of the things you are destined to suffer. Look! the Devil will keep on throwing some of you into prison that you may be fully put to the test, and that you may have tribulation ten days. Prove yourselves faithful even with the danger of death, and I will give you the crown of life."—Matthew 10:28; Revelation 2:10, *New World Translation.*

In the Hebrew Scriptures there are many cases where Jehovah's Witnesses fought and used violence and carnal weapons of warfare. They fought in the armies of the nation of Israel. At the time they fought as members of the armed forces of Israel it was God's chosen nation. They did not, however, enlist or volunteer in the armies of the foreign nations round about. They fought only in the armed forces of Israel, the nation of God. They did not join the armies of the Devil's nations. They maintained strict neutrality as to the warring nations who were their neighbors. When Jehovah abandoned and destroyed his chosen nation, he abandoned completely and forever the requirement that his people fight with armed forces. Since then there has been no force used by his witnesses in any armed force.

There is no record in the Bible that any of the faithful Israelites enlisted in the armed forces of or fought in behalf of any of the Devil's countries or nations. To the contrary we have the instance of Abraham who maintained his neutrality. (Genesis 14) Also to the same effect is Zerubbabel, a soldier of Jehovah, who had a covenant to rebuild the temple. He refused to participate in the military conflicts that the world power, Medo-Persia, got into. He remained strictly neutral. For so doing he was accused of sedition and was prosecuted. Jehovah, however, blessed him for his neutral stand and for keeping to his post of duty under his covenant obligations.—Ezra 5:1-17; 6:1-22.

This position of strict neutrality, requiring refusal to participate in international conflicts between the forces of the nations of Satan's world, is also based on the Bible ground that Jehovah's Witnesses are ambassadors who serve notice of the advance of the great warrior, Christ, who is leading a vast army of invisible warriors of the armed force of Jehovah. (2 Corinthians 5:20; Revelation 19:14) He is advancing against Satan's organization, all of which, human and demon, he will destroy at the battle of Armageddon.

Jehovah's Witnesses do not participate in the modern-day armed forces of Jehovah. (2 Chronicles 20:15-17) Participation in that armed force is limited to the powerful angelic host, led by the invisible Commander, Christ Jesus. He rides at the front on his great white war mount. (Revelation 19:11-14) The weapons of the invisible forces of Jehovah are unseen but destructive weapons. Such will make the weapons of Caesar's armed forces of this world like children's toys in comparison. (Joel 3:9-15; Isaiah 40:15) Jehovah's weapons of destruction at Armageddon will be used by only his invisible forces, and not by Jehovah's Witnesses.

The weapons of warfare wielded by Jehovah's Witnesses are confined to instruments that cannot be used in violent warfare. They use the "sword of the spirit, which is the

word of God" as his Christian soldiers and ambassadors to warn the nations of this world of the coming battle of Armageddon. That will result in the defeat of all of Satan's armies and the wiping off the face of the earth of all the nations and governments of this evil world. "For it is my decision to gather nations, to assemble kingdoms, that I may pour out my wrath upon them, all the heat of my anger, for in the fire of my zeal all the earth shall be consumed." (Zephaniah 3:8, *An American Translation;* Jeremiah 25:31-33; Nahum 1:9, 10) They therefore cannot give up the weapons of their warfare and take up the weapons of violence in behalf of the nations of the world of Satan. The use of such weapons by Jehovah's Witnesses and their participation in any way in the international armed conflicts would be in defiance of the unchangeable law of Almighty God.

There is no record that the Lord Jesus or his apostles or disciples entered the armies of Caesar. The record of secular history shows that the early Christians at Rome refused to fight in Caesar's army. They were thrown to the lions and persecuted because of following the command of Christ Jesus to disassociate themselves from the affairs of the evil world.

The basis of objections to military service by followers of Christ Jesus, including the early Christians at Rome and their modern-day counterparts, Jehovah's Witnesses, can best be summed up by Jesus, who declared, "My kingdom is no part of this world. If my kingdom were part of this world, my attendants would have fought that I should not be delivered up to the Jews. But, as it is, my kingdom is not from this source." (John 18:36, *New World Translation*) Since Jehovah's Witnesses are not of this world, then, as the Lord Jesus did not, they cannot fight in or join up with the armed forces of the nations of this world represented by Caesar. They, accordingly, render to God that which is God's by remaining steadfastly in his army of witnesses and refusing to volunteer or submit to the

armed forces of Caesar in international conflicts. They render to Caesar all obligations of citizenship that do not require them to violate God's law. Thus they do as Jesus said: "Pay back Caesar's things to Caesar, but God's things to God."—Mark 12:17, *New World Translation.*

Jehovah's Witnesses do not advocate that the governments of this world do not have the right to raise armies from those other than the ministers of God. They do not teach others of Jehovah's Witnesses or people who are not to refuse to support the armed forces or volunteer for service. It would be wrong to do so. They render to Caesar the things that are Caesar's by not teaching the subjects of Caesar to refuse to fight. Jehovah's Witnesses do not aid, abet or encourage persons who are not ministers with conscientious objections to resist the commands of Caesar. They do not, in fact, tell each other what to do or not to do. Each witness of Jehovah decides by himself alone what course he will take. His decision as to whether to render to God what is God's is dictated by his individual understanding of the law of God in the Word of Jehovah, the Bible. His decision is formed not by the written or printed word of the Watchtower Society or any person among Jehovah's Witnesses.

The draft act provides for the deferment of conscientious objectors, as well as the exemption of ministers of religion. Jehovah's Witnesses are entitled to claim the exemption granted to the ministers of God and the orthodox clergy. They are also entitled to the deferment extended to the conscientious objectors who refuse to participate in warfare based on religious training and belief notwithstanding the fact that they are not pacifists. In complying with such law by claiming such ministerial exemption and deferment they render to Caesar the things that belong to Caesar. They are therefore consistent in making their claim. They are conscientious objectors but not pacifists. In taking this stand they continue and remain God's ministers, properly called the witnesses of Jehovah.

Jehovah's Witnesses do not consider the act unconstitutional. They believe that it is within the province of a nation to arm itself and resist attack or invasion. It is admitted that the Government has the authority to take all reasonable, necessary and constitutional measures to gear the nation for war and so lubricate the war machinery to keep it working effectively.

Conscription of man power for the purpose of waging war is of ancient origin. Before the Roman Empire and early world powers, the nation of Israel registered men for military training and service. Complete exemption from military service and training was provided, however, for ministers and priests known as "Levites." Twenty-three thousand of the first registration were completely exempt according to statistics. Under this system of raising and maintaining an army the Jewish nation fought many battles and gained many victories. Since the destruction of the Jewish nation, Jehovah's Witnesses have been neither commanded nor authorized to conscript man power or wage wars. They are not organized as a nation in the world as were the Israelites. They are in the world as ambassadors to represent God's kingdom, as witnesses to proclaim the theocracy, the only hope of the people of good will to obtain peace, prosperity, happiness and life. They neither oppose nor advocate opposition to or participation by others in war. Each one individually, for himself, determines what course he must take according to the perfect Word of God. As one of the "royal priesthood," Jehovah's Witnesses, as the Levites, lay claim to complete exemption from military service according to the provision of the act because they are ordained ministers of the gospel of God's kingdom. This position of strict neutrality is the position taken by everyone who fights not with carnal weapons and faithfully and strictly follows in the footsteps of Christ Jesus and preaches the gospel as did he and his apostles, according to the Holy Word of God.

History shows that the early Christians claimed exemp-

tion from military service required by the Roman Empire, because they were set apart from the world as a royal priesthood to preach God's kingdom. Hence they were neutral toward war. They claimed complete exemption from training and service, which was disallowed by the Roman Empire. Because they refused military service they were cruelly persecuted, sawn asunder, burned at the stake and thrown to the lions.—See Henry C. Sheldon, *History of the Christian Church,* 1894, Crowell & Co., New York, p. 179 *et seq.;* E. R. Appleton, *An Outline of Religion,* 1934, J. J. Little & Ives Co., New York, p. 356 *et seq.;* Capes, *Roman History,* 1888, Scribner's Sons, New York, p. 113 *et seq.;* Willis Mason West, *The Ancient World,* 1913, Allyn & Bacon, Boston, pp. 522-523, 528 *et seq.;* Capes, *The Roman Empire of the Second Century,* Scribner's Sons, New York, p. 135 *et seq.;* Ferrero & Barbagallo, *A Short History of Rome* (translated from Italian by George Chrystal), Putnam's Sons, New York, 1919, p. 380 *et seq.*

A realistic approach to the construction of an act providing for benefits to religious organizations requires that boards make "no distinction between one religion and another.... Neither does the court, in this respect, make any distinction between one sect and another." (Sir John Romilly in *Thornton* v. *Howe,* 31 Beavin 14) The theory of treating all religious organizations on the same basis before the law is well stated in *Watson* v. *Jones,* 80 U. S. (13 Wall.) 679, 728, thus: "The full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." It must be assumed that Congress, when it provided for ministers of religion to be exempt from all training and service, intended to adopt the generous policy above expressed so as to extend to all ministers of all religious organizations.

It has been judicially declared that were "the administration of the great variety of religious charities with which our country so happily abounds, to depend upon the opinion of the judges, who from time to time succeed each other in the administration of justice, upon the question whether the doctrines intended to be upheld and inculcated by such charities, were consonant to the doctrines of the Bible; we should be entirely at sea, without helm or compass, in this land of unlimited religious toleration." (*Knistern* v. *Lutheran Churches,* 1 Sandf. Ch. 439, 507 (N. Y.)) All religions, however orthodox or heterodox, Christian or pagan, Protestant or Catholic, stand equal before the law which regards "the pagan and the Mormon, the Brahmin and the Jew, the Swedenborgian and the Buddhist, the Catholic and the Quakers as all possessing equal rights." (*Donahoe* v. *Richards,* 38 Me. 379, 409. Cf. *People* v. *Board of Education,* 245 Ill. 334, 349; *Grimes* v. *Harmon,* 35 Ind. 198, 211) Protection is therefore afforded not only "to the different denominations of the Christian religion, but is due to every religious body, organization or society whose members are accustomed to come together for the purpose of worshiping the Supreme Being." (*Freeman* v. *Scheve,* 65 Neb. 853, 879, 93 N. W. 169) It is now clear that the American legislative, executive and judicial policy concerning religious organizations, beliefs and practices is one of masterly inactivity, of hands off, of fair play and no favors. (*People* v. *Steele,* 2 Bar. 397) "So far as religion is concerned the laissez faire theory of government has been given the widest possible scope."—*Freeman* v. *Scheve,* 65 Neb. 853, 878, 93 N. W. 169.

Neither Shakers nor Universalists will be discriminated against in distributing the avails of the land granted by Congress in 1778 for "religious purposes." (*State* v. *Trustees of Township,* 2 Ohio 108; *State* v. *Trustees,* Wright 506 (Ohio)) Whatever the personal views of a judge may be concerning the principles and ceremonies of the Shaker society, whether to his mind their practices smack of fanaticism or not, he has no right to act upon such individual

opinion in administering justice. (*People* v. *Pillow,* 3 N. Y. Super. Ct. (1 Sandf.) 672, 678; *Lawrence* v. *Fletcher,* 49 Mass. 153; *Cass* v. *Wilhite,* 32 Ky. (2 Dana) 170) In the field of religious charities and uses the doctrine of superstitious uses was eliminated from American jurisprudence as opposed to the spirit of democratic institutions because it gave preference to certain religions and discriminated against others. It was held that the doctrine is contrary to "the spirit of religious toleration which has always prevailed in this country" and could never gain a foothold here so long as the courts were forbidden to decide that any particular religion is the true religion. (*Harrison* v. *Brophy,* 59 Kans. 1, 5, 51 P. 885; cf. *Methodist Church* v. *Remington,* 1 Watts 219, 225, 26 Am. Dec. 61 (Pa.); *Andrew* v. *New York Bible and Prayer Book Society,* 6 N. Y. Super. Ct. (4 Sandf.) 156, 181) Thus in the field of various religions as long as a particular method of preaching does not conflict with the law or the rights of others no matter how exotic or curious it may be in the opinion of others it is fully protected by the law. —*Waite* v. *Merrill,* 4 Me. (4 Greenl.) 102, 16 Am. Dec. 238, 245.

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact.

The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful. —*Johnson* v. *United States,* 126 F. 2d 242, at page 247 (8th Cir.); *Dickinson* v. *United States,* 346 U. S. — (Nov. 30, 1953).

A district court opinion bears directly upon the question involved here. This is the unreported oral opinion rendered by Judge Clifford from the bench, sitting in the United States District Court for the District of New Hampshire in cause No. 6216, *United States* v. *Konides,* March 12, 1952. In that case one of Jehovah's Witnesses was denied the conscientious objector status. The facts, as far as the evidence appearing in the file on the subject of conscientious objection is concerned, were identical to the facts in this case. A printed copy of the stipulation of fact and oral opinion rendered by Judge Clifford is here referred to and accompanies this brief.—Compare *Phillips* v. *Downer,* 135 F. 2d 521, 525-526 (2d Cir.); *United States* v. *Grieme,* 128 F. 2d 811 (3rd Cir.).

A case closely in point here is *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. Dec. 19, 1952), where the defendant was a member of the National Guard at the time of his registration and the filing of his original questionnaire. The board had deferred him because of his membership in that military organization. Following this he became one of Jehovah's Witnesses. He later filed claims for classification as a minister of religion and as a conscientious objector. The case was appealed to the National Selective Service Appeal Board, which classified him in Class I-A. The classification was set aside as arbitrary and capricious. Read at page 378.

The pivotal decision for the determination of issues raised in draft prosecutions is *Estep* v. *United States,* 327 U. S. 114. The Supreme Court there itemized certain things committed by a draft board "that would be lawless and beyond its jurisdiction." (327 U. S., at page 121) Read what

the Court said about provisions of the act that make determinations of draft boards "final," at pages 121-123.

In note 14 of the *Estep* opinion (at page 123) the Court says that the scope of judicial inquiry to be applied in draft cases is the same as that of deportation cases, and the Court cited *Chin Low* v. *United States,* 208 U. S. 8; *Ng Fung Ho* v. *White,* 259 U. S. 276; *Mahler* v. *Eby,* 264 U. S. 32; *Vajtauer* v. *Commissioner,* 273 U. S. 103; *Bridges* v. *Wixon,* 326 U. S. 135. In this note the Court added that "is also the scope of judicial inquiry when a registrant after induction seeks release from the military by *habeas corpus.*" The Court concluded note 14 explaining the scope of judicial review by citing the opinion of the Second Circuit in *United States* v. *Cain,* 144 F. 2d 944.—327 U. S., at page 123.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a court, it would be the duty of the court to hold that the classification was beyond its jurisdiction. —327 U. S., at page 122.

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant. The facts established in his case show that he is a conscientious objector to both combatant and noncombatant service and, therefore, the classification given is beyond the jurisdiction of the boards.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on

sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states throughout American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, *Conscientious Objection,* Special Monograph No. 11, Vol. I, pp. 29-66, Washington, Government Printing Office, 1950.) So strongly was the principle of conscientious objection imbedded in American principles that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon us by Special Monograph No. 11, Vol. I, *supra,* at page 43: "At the end of hostilities

Secretary of War Stanton said that President Lincoln and he had 'felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.' "

As appears above, the Selective Service System in Special Monograph No. 11, Vol. I, carries the history far back, even before the American Revolution. (*Ibid.,* pages 29-35) Virginia and Maryland exempted the Quakers from service. (*Ibid.,* page 37) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

> "No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun."—*Ibid.,* pages 42-43.

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard* v. *United States,* 328 U. S. 61. Read 328 U. S. at pp. 68-69.

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and

conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

It is respectfully submitted that the motion for judgment of acquittal should have been sustained because there is no basis in fact for the classification given by the draft boards and the denial of the total conscientious objector classification was arbitrary and capricious. The judgment of the court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

POINT TWO

The report of the hearing officer of the Department of Justice and the recommendation of the Assistant Attorney General to the appeal board (that appellant be denied his conscientious objector status because of his willingness to work in a naval shipyard) were arbitrary, capricious and based on artificial and irrelevant grounds, contrary to the act and regulations.

Section 6(j) of the act provides for the appropriate inquiry and hearing in the Department of Justice. The act and the regulations provide for the recommendation by the Department of Justice to the appeal board following the hearing before the hearing officer. The act and the regulations, therefore, make the inquiry, the hearing and the recommendation of the Department of Justice to the appeal board a statutory and vital link in the chain of administrative proceedings. The consequence of this is that it is necessary that the proceedings in the Department of Justice be in accordance with law and that they do not conflict with and defy the law.

Appellant submits that the Department of Justice misinterpreted Section 6(j) of the act. It is to be observed that Congress never provided that the conscientious objections must be to "war in any form." Congress did not hold that a conscientious objector who was not opposed to self-defense and employment in defense work was not a

conscientious objector. It is participation in war in any form that is the subject matter of the statutory provision for the conscientious objector. Nothing whatever is said in the act or the regulations or in the legislative history that indicates anything to the effect that if a person is willing to do a certain type of work he cannot be considered a conscientious objector having conscientious scruples to participation in war in any form even though he was willing to perform secular defense work as a means of employment. If the unreasonable interpretation placed upon the act by the trial court and the local board is accepted it will authorize an unending and uncontrollable scope of inquiry. Every type of work and act that may be conceivably thought of can be relied upon to determine and deny the conscientious objector status.

Congress did not intend to allow an inquest to be held as to the kind of work that a registrant did or was willing to do. Congress intended to protect every person who had conscientious objections based upon religious grounds to participation in war in any form. Congress did not make the factors relied upon by the trial court and the local board in this case as any basis in fact for the denial of the conscientious objector claim.

Neither the act nor the regulations make the type of work that a person does a criterion to follow in the determination of his conscientious objections. The sole questions for determination of conscientious objection are: (1) does the person object to participation in the armed forces as a soldier? (2) does he believe in the Supreme Being? (3) does this belief carry with it obligations to God higher than those owed to the state? (4) does his belief originate from a belief in the Supreme Being and not from a political, sociological, philosophical or personal moral code?

Franks' case commands affirmative answers to all these questions. He fits the statutory definition of a conscientious objector.

It is entirely irrelevant and immaterial to hold that

there was basis in fact because Franks was willing to work in a steel plant. This was not an element to consider and in any event it was no basis in fact according to the law for the denial of his claim. It did not impeach or dispute in any way what he said in his questionnaire and conscientious objector form, all of which was corroborated by the FBI report. The law does not authorize the draft boards to invent fictitious and foreign standards and use them to speculate against evidence and facts that are undisputed.—*Annett* v. *United States,* 205 F. 2d 689 (10th Cir.); *United States* v. *Alvies,* 112 F. Supp. 618 (N. D. Cal. S. D. 1953); *United States* v. *Graham,* 109 F. Supp. 377 (W. D. Ky. 1952); *United States* v. *Everngam,* 102 F. Supp. 128 (D. W. Va. 1951).

The question of employment and work performed by one who claims to be a conscientious objector becomes material only when the type of work done or agreed to be done by the conscientious objector is of a combatant nature. The Congress of the United States in passing the Universal Military Training and Service Act provides for two kinds of conscientious objectors. One is a person who has objections only to the performance of combatant service. He is recognized as willing to wear a uniform and do anything in the armed forces except kill or bear weapons. This type of conscientious objector does not have his conscience questioned because of the type of work he is willing to perform even though it may be in the armed forces. No board or official of the government may deny a registrant his conscientious objector claim to the I-A-O classification (limited military service as a conscientious objector opposed to combatant military service only) because of his willingness to perform noncombatant service in the armed forces, thus helping the armed services do a job of killing.

It is submitted also that the conscientious objector to both combatant and noncombatant military service ought not to be denied his conscientious objector classification because of the kind of work he is doing outside the armed

services. The law disqualifies no one on such ground. It seems that a reasonable interpretation of the act and the regulations would not make the type of employment that a registrant is willing to do relevant so long as it does not involve combatant or noncombatant military service.

It is apparent that the conclusion reached by the hearing officer, after finding as a fact appellant to be a conscientious objector, was arbitrary and capricious because the basis for the rejection of appellant's evidence was on illegal and irrelevant grounds.—*Linan* v. *United States,* 202 F. 2d 693 (9th Cir. 1953).

The report of the hearing officer was adopted by the Department of Justice and forwarded to the appeal board with a recommendation that it be followed. The appeal board followed the recommendation. While the recommendation was only advisory, the fact is that it was accepted and acted upon then by the appeal board. The appeal board concurred in the conclusions reached by the hearing officer. It gave appellant a I-A classification and denied his conscientious objector status. This action on the part of the appeal board prevents the advisory recommendation of the Department of Justice from being harmless error. —See *United States* v. *Everngam,* 102 F. Supp. 128 (D. C. W. Va. Oct. 31, 1951).

A chain is no stronger than its weakest link. The recommendation of the Department of Justice and its acceptance by the appeal board becomes a link in the chain. Since it is one of the links of the chain, its strength must be tested. (*United States* v. *Romano,* 103 F. Supp. 597 (D. C. N. Y. S. D. 1952)) The absence of the FBI report from the record and the withholding of it from the registrant at the hearing produces a break in the link and makes the entire Selective Service chain useless, void and of no force and effect. The Supreme Court held in *Kessler* v. *Strecker,* 307 U. S. 22, that if one of the elements is lacking, the "proceeding is void and must be set aside." (307 U. S., at page 34) The acceptance of the recommendation of the Department of

Justice which has been made up without producing the FBI report to the registrant in the proper time and manner makes the proceedings illegal notwithstanding the fact that the recommendation is only advisory. The embracing of the report and recommendation by the appeal board jaundiced and killed the validity of the proceedings.

This view of the reliance upon the recommendation of the Department of Justice making the report of the hearing officer and the recommendation a vital link in the administrative chain is supported by *United States* v. *Everngam,* 102 F. Supp. 128 (D. C. W. Va. 1951), at pages 130, 131. —See also *United States* v. *Bouziden,* 108 F. Supp. 395. (W. D. Okla.); compare *Taffs* v. *United States,* — F. 2d — (8th Cir. Dec. 7, 1953).

The holding below giving freedom to the hearing officer to find against appellant on grounds outside the law conflicts with *Reel* v. *Badt,* 141 F. 2d 845 (2d Cir.). In that case the court said: "In other words, he reached a conclusion as a matter of law which was directly opposed to our decision in *U. S.* v. *Kauten,* 133 F. 2d 703." (141 F. 2d, at page 847)—See also *Phillips* v. *Downer,* 135 F. 2d 521 (2d Cir.), at pages 525-526.

It is respectfully submitted that the recommendation by the hearing officer and the Department of Justice to the appeal board is illegal, arbitrary and capricious, and jaundiced and destroyed the appeal board classification upon which the order to report was based.

CONCLUSION

It is submitted that the undisputed evidence showed that appellant was conscientiously opposed to participation in both combatant and noncombatant military service. The denial of the full conscientious objector status was, therefore, without basis in fact. The final I-A classification by the appeal board, accordingly, was arbitrary and capricious. The recommendation of the Department of Justice

(that appellant was not entitled to claim classification as a conscientious objector, notwithstanding his sincerity, because he was willing to work in a naval shipyard as a civilian employee) was immaterial, irrelevant and contrary to the act and the regulations. The acceptance of the recommendation and the giving of the I-A classification by the appeal board, based on such recommendation of the Department of Justice, are void. The classification, as well as the order to report for induction, is illegal.

The judgment of the court below ought, therefore, to be reversed. The trial court should be instructed to enter a judgment of acquittal.

Respectfully submitted,

Hayden C. Covington

124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

January, 1954.

No. 14,114

United States Court of Appeals

For the Ninth Circuit

WILLIAM EDWARD FRANKS,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

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No. 14,114

United States Court of Appeals

For the Ninth Circuit

WILLIAM EDWARD FRANKS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

This is an appeal from a judgment of conviction rendered and entered by the United States District Court for the Northern District of California, Southern Division. Jurisdiction is invoked by appellant under Rule 27(a)(1),(2) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

Appellant was indicted for a violation of the Universal Military Training and Service Act (R 3-4). He was classified 1-A, making him liable for military training and service. He was ordered by his local draft board to report for induction (R 3-4). At the induction center appellant knowingly refused to sub-

mit himself to induction into the armed forces of the United States. Appellant was tried before the United States District Court for the Northern District of California on May 22, 1953 (R 8) by the court, without a jury. A motion for judgment of acquittal was denied (R 36, 50). The Court found him guilty as charged (R 5, 6). Appellant was sentenced to a term of eighteen months (R. 5, 6). Appeal was then timely made to this Court from the judgment of conviction (R 52, 53).

FACTS.

The defendant registered for the draft on April 27, 1950 (File 3). On April 30, 1951 he was mailed his classification questionnaire (File 4). He listed his job at that time as "Construction" (File 7). He indicated that he worked an average of 40 hours per week and was paid $1.65 per hour (File 8).

With his classification questionnaire Franks enclosed a letter in which he claimed conscientious opposition to war and requested the local board to furnish him with the special form for conscientious objectors, SSS Form 150 (File 12). In a special form for conscientious objectors the defendant stated that he believed in the use of force for self-defense (File 14). The defendant gave as a basis of his claim for exemption, that he believed in "strict neutrality" (File 15).

Franks claimed membership in the Jehovah's Witnesses Society (File 17). In answer to a question con-

cerning the creed or official statements of that sect in relation to participation in war, he answered, "There are no official statements made by the organization; it is left entirely to the individual" (File 17).

On June 12, 1951 by a vote of 3 to 0 Franks was classified 1-A (File 11). On the 22nd of that month he requested a personal appearance before the local board (File 11). On July 10, 1951 Franks personally appeared before the local board. At that time defendant stated that he conscientiously objected to taking training in any form (File 27). The local board, after consideration of all the evidence, found that Franks was in their opinion not a true conscientious objector (File 27). Accordingly, the board voted unanimously that he should be classified 1-A (File 27).

On July 20, 1951 Franks filed a notice of appeal (File 28). On March 6, 1952 a hearing was held before the hearing officer of the Department of Justice (File 33-A). At that time Franks filed five affidavits attesting the fact that he belonged to the Jehovah's Witnesses Organization (File 35, 36, 37, 38, 39).

The Federal Bureau of Investigation report to Mr. Williams revealed that few of the defendant's teachers and co-workers knew of his attitude toward military service and participation in war (File 43).

At the time of his hearing the defendant admitted he worked 40 hours a week as a boiler-maker's helper in a steel plant (File 43). Franks admitted he was willing, under some circumstances, to work in a naval

shipyard (File 44). Mr. Williams felt that the defendant was "not completely motivated by deep religious conviction in his professed opposition to participation in war" (File 44).

The Department of Justice on May 26, 1952 recommended that the "registrant" be not classified as a conscientious objector (File 40). Franks was classified by the appeal board 1-A by a vote of 4 to 0 on July 3, 1952 (File 31). Franks was ordered to report for induction on November 3, 1952 (File 46). On that date he appeared for induction but refused to submit to induction (Record 10).

It was stipulated at the trial of the case that the defendant refused to submit to induction and that a photostat of his Selective Service file be introduced into evidence (Record 10, 11).

QUESTIONS PRESENTED.

1. Does the statute giving exemption for conscientious objection require opposition to force and killing, or only to service in the armed forces?

2. Was there basis in fact for the Selective Service Appeal Board to refuse Franks' claim of conscientious objection?

SUMMARY OF ARGUMENT.

1. SCOPE OF REVIEW.

Selective Service classifications are not subject to the customary scope of judicial review which obtains under other statutes. Congress provided in the Act that classification orders should be final. This is justified by the fact that exemption from service is a matter of legislative grace. Selective Service is geared to the imperative needs of mobilization and national vigilance when there is no time for litigious interpretation. A Court may go behind the classification only when the jurisdiction of the Board is exceeded. When dealing with the Board's determination of the state of mind of a registrant, the greatest deference must be paid to the Board. The Board's determination that a registrant has not satisfied his burden of proof, should not be defeated by a naked claim of exemption by the registrant.

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2. WHAT IS THE STANDARD FOR CONSCIENTIOUS OBJECTION?

Appellant claims the standard for conscientious objection under the statute is religious objection to participation in the armed forces as a soldier. The correct standard requires two elements: (a) The registrant must be conscientiously opposed to war; and (b) such opposition must be by reason of religious training and beliefs. Congress did not intend to exempt persons who objected to service but did not object to force and killing. Appellant's standard fails to differentiate between one who objects to serving

the United States and one who objects to participation in war. The United States need not conclude a treaty of alliance with the Jehovah's Witnesses Church in order to require military service of its members.

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3. MATERIALITY OF WAR WORK.

Willingness to work in a naval shipyard is material in showing the inconsistencies of Franks' claim. He refused service as a non-combatant, that is to say, one in the service who is assigned to work not involving force. This is inconsistent with his views on civilian work which will allow him to make battle ships which can efficiently exterminate human life. In addition the Board could find that beliefs which include willingness to complete war machines do not reach the standard required for conscientious opposition to war in any form.

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4. THE DEPARTMENT OF JUSTICE HEARING.

The Appeal Board actually has the power of decision in these cases. The hearing report and recommendation of the Department of Justice is merely advisory. Assuming, but not conceding, that some errors were committed in the Department of Justice hearing, if there was evidence to justify Franks' classification before the Appeal Board, the jurisdiction of the administrative agency has not been exceeded. In any event, the recommendation of the Department of Justice in Franks' case was proper.

5. FRANKS IS NOT OPPOSED TO ALL WARS.

Franks' admitted beliefs are not such to justify exemption as a conscientious objector. Franks is not opposed to all wars. He approves certain wars of the past and merely claims "strict neutrality" in wars in which the United States is a party. One cannot approve of wars conducted by theocracies and claim conscientious opposition to wars conducted by the United States. Franks admitted he is not a pacifist since he is authorized to fight to defend a theocratic government. Franks has not asserted views on the use of force; he has merely objected to fighting for his country. Since he believes in the use of force for self-defense and is merely neutral towards war and willing to do civilian work in a naval shipyard, the Selective Service Board was justified in finding that he had not established his eligibility for deferment.

ARGUMENT.

SCOPE OF REVIEW.

It is important to underline an important feature of this case. The Universal Military Training and Service Act does not permit direct judicial review of selective service classification orders, rather the Act provides as in the 1917-1940 Conscription Act before it, that classification orders by selective service authorities shall be final. *Dickinson v. United States,* 346 U.S. ..... The evidence in this case must be considered against the background of the Selective Service Act. Congress chose not to give administrative

action under this Act the customary scope of judicial review which obtains under other statutes. Courts are not to weigh the evidence to determine whether the classification made by the local board was justified. The decisions of the local board made in conformity with the regulations are final, even though they may be erroneous. The question of the jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. *Estep v. United States,* 327 U.S. 114, 122, 123.

The interests of the country are above and beyond any individual or any class of individuals. Except for the practical side of the situation our country would not indulge in war, nor would it require any of its citizens to act in furtherance of a war effort, but the great majority do not subscribe to the doctrine of peace at any price and laws must be made to conform to the best thought of such majority; otherwise we would have no country. *Cannon v. United States* (9th Cir.), 181 F.2d 354, 356. The country has the right to inquire closely into the ideas and beliefs of those to whom it gives exemption from universal military service. There is no constitutional right to exemption from military service because of conscientious objector or religious calling. *Richter v. United States* (9th Cir.), 181 F.2d 591, 593. Whatever the government may forbid altogether, they may grant only on certain conditions. *George v. United States* (9th Cir.), 196 F.2d 445, 450; *Eberly v. Michigan,* 232 U.S. 700. It must be recognized that selective serv-

ice must be geared to meet the imperative needs of mobilization and national vigilance when there is no time for litigious interpretation. *United States v. Nugent,* 346 U.S. 1, 10.

The *Dickinson* case, supra, reemphasizes what has always been the law, that a classification must be based upon more than mere suspicion and conjecture, and that if a defendant has made a *prima facie* case for exemption, some affirmative evidence must be presented for a basis in fact for the classification given. The *Dickinson* case, however, while it involved a Jehovah's Witness, did not concern the problem of exemption under 6-J of the Universal Military & Training Act. When faced with determining the beliefs of a registrant concerning the use of force, the Selective Service Board has a different problem than when it seeks to decide whether he is a minister. When a registrant claims to be conscientiously opposed to participation in war in any form, the Board is faced with the problem of determining what is going on in the registrant's mind. Whether or not an individual is a minister can be determined upon the basis of observable facts. However, when the ultimate issue concerns a mental phenomenon a different and more complex task confronts the trier of the fact.

If a registrant repeats the words of the statute, what method can there be to prove that he does not fit within the exemption. The Selective Service Board has no machine which can probe the inside of a man's mind. *United States v. Nugent,* supra, held that Selective Service classification need not be conducted

as a trial before the United States District Court. Procedures must merely preserve basic fairness. The *Nugent* case recognizes that Selective Service is an administrative agency functioning to raise an army. It is not conducting criminal trials. Procedures, therefore, must be designed to conform to the time requirements of modern warfare. When the issue of sincerity is before the Selective Service System it must have the right to disbelieve. If the only evidence in the record is a simple statement that the registrant is opposed to war, the Selective Service System cannot be precluded from finding, if it so believes, that the registrant *has not established the proof required by the statute.* The burden is on the registrant to prove his sincerity and beliefs with evidence. *Dickinson v. United States,* supra.

This Court has previously held that the demeanor of the witness and his sincerity and candor is a matter for the trial tribunal. *Ashton v. Seatney* (9th Cir.), 145 F.2d 719. The Supreme Court recognizes that where a decision is based upon motives and purposes, the evidence of which depends largely upon the credibility of witnesses, a particularly appropriate case is made for upholding the trier of the fact. *United States v. Oregon Medical Society,* 343 U.S. 326, 332. Ordinarily the finding of a jury that the defendant had criminal intent is not upset. Why then inquire into the Board's finding on sincerity?

If there is nothing but a mere claim of right of exemption and no evidence to prove this claim, the Court should uphold the determination of the Board.

The Court of Appeals, with nothing but the cold record before it, is not in a good position to rule on a question which involves the examination of the state of mind of a defendant. Men form their beliefs in many ways. The objective manifestations of those beliefs are few and untrustworthy. If the Board finds that a registrant's beliefs are not of the required character or that he is not sincere, this Court should not reverse the Board's decision.

WHAT IS THE STANDARD FOR CONSCIENTIOUS OBJECTION?

Mr. Covington argues that since Congress did not expressly provide that willingness to work at building war machines could be considered in determining whether a registrant was sincerely opposed to war, the Selective Service Board cannot take it into account. According to Mr. Covington, the sole questions in determining who is a conscientious objector are:

(1) Does the person *object* (emphasis added) to participation in the armed forces as a soldier?

(2) Does he believe in a Supreme Being?

(3) Does this belief carry with it obligations to God higher than those owed to the State?

(4) Does the belief originate from a belief in a Supreme Being and not from a political, sociological, philosophical or personal moral code? (Page 32, appellant's brief.)

The last three questions are the requirements imposed by this Court in *Berman v. United States,* 156 F.2d 377, cert. den., 329 U.S. 795, referred to in Senate Report No. 1268, 80th Congress 1948, and incorporated into 6-J of the Act, that conscientious objection be founded on religious rather than political or sociological beliefs. The first question, however, seems to us to represent a fallacious standard upon which to base exemption from service. Mr. Covington contends that all that is necessary for exemption is that the registrant be religious and object to serving as a soldier. If this were true, almost all religious young men would be exempt. In a broad sense every American "objects" to serving as a soldier. War and regimentation are un-American. "Conscientious objection to war in any form" is a requirement of the statute.

This Court has previously indicated that there are two elements which must be present before there is exemption under the Act: (1) Registrant must be conscientiously opposed to *war;* and (2) Such opposition must be by reason of religious training and beliefs. In *Linan v. United States,* 202 F.2d 693, 694, cited by appellant, the Court affirmed the District Court because "there was absolutely nothing in the testimony before the Board supporting his claim as a conscientious objector, *or* that he was such by reason of religious training . . ." (Emphasis added).

In the *Berman* case supra, the Court held that while the defendant might be conscientiously opposed

to war, since he was not so opposed by reason of religious training and belief he could not be exempted from service. Judge Stephens expressly distinguished between conscientious objection to war and the requirement that such conscientiousness be by reason of religious conviction. At page 381 he said "whether or not the triers of fact thought appellant's objection to war were conscientious is not decisive of this case. Even if the evidence should compel the finding that he was conscientious, and we do not suggest that it does, he could not succeed in his appeal. There is not a shred of evidence in the case to the effect that appellant relates his way of life or his objection to war to any religious training or belief."

The instant case involves the converse of the *Berman* case. It poses the question whether or not a registrant must be deferred if he is religious, despite the fact he is not opposed to war. The church to which Franks belonged has for years objected to any participation with the United States as a country; it is against saluting or pledging allegiance to the flag. Franks contends he is strictly "neutral," that is to say, he does not consider he owes allegiance to the United States, but in fact would be deserting his own army if he served in that of this country. This principle of non-allegiance, it can be inferred, is the grounds for Franks' opposition to service in the armed forces. However, this objection to serving the United States is not necessarily of a character which would give exemp-

tion under the Universal Military & Training Act. Appellant objects to serving as a soldier.

However, the clear intent of Congress is that the objection necessary under the statute is objection to war. War, force and killing are the things to which a registrant must be conscientiously opposed. Objection to serving a country, even on religious grounds, is not the standard under the statute. A conscientious objector must believe that killing is in every instance wrong; he must hate war, not merely object to service. He must not be opposed to the use of force in every instance, not merely declare himself neutral in wars to which his country, but not his church, is a party. The United States need not conclude a treaty of alliance with the Jehovah's Witnesses church to require military service of its members. A clear line exists between opposition to war in any form and mere objection to service in the armed forces.[1] Mr. Covington's standard is wrong because it disregards this difference.

MATERIALITY OF WAR WORK.

Franks expressed his willingness before the hearing officer of the Department of Justice to work in a Naval Shipyard (file 44). Such work may, in fact, more directly aid the war effort than the duty of the average G.I. Building the instruments of war

[1]See *In re Summers*, 325 U.S. 561, 575 for some of the elements of conscientious objection to war.

certainly is more directly connected with killing than service as a medic, administering to battle wounds. Franks claimed exemption from both combatant and non-combatant military service. He refused classification as a 1-A-O. There is a strong inconsistency between willingness to build battle ships at adequate compensation and unwillingness to minister to the sick and the helpless in a person who claims to be conscientiously opposed to force and killing.

Willingness to work in a Naval shipyard becomes material in this case on the issue of Franks' beliefs concerning war. If he does not object to building war ships, how then can he consistently claim objection to helping the sick and wounded. The warship will help the armed forces do a job of killing more directly than relieving pain and suffering. If a person believes that it is proper to stay at home and build the machines of war, cannot the Selective Service Board infer that his beliefs do not exceed the natural abhorrence to war of every American and every Christian, and cannot the Board find that such beliefs do not meet the conscientious objector classifications required by Congress for exemption? The United States submits that the hearing officer of the Department of Justice adopted the correct standard in the case of Franks. His finding that a registrant who would work in a Naval shipyard was not a conscientious objector under the statute, is one which this Court would probably make if it were hearing this case *de novo*.

THE DEPARTMENT OF JUSTICE HEARING.

This Court has previously held that the Appeal Board has the power of decision in these cases and their action supersedes the action of the bodies lower down the line. *Cramer v. France* (9th Cir.), 148 F.2d 801; *Tyrrell v. United States* (9th Cir.), 200 F.2d 8; *Reed v. United States* (9th Cir.), 205 F.2d 216.

While recognizing that the advisory report of the Department of Justice could be so inaccurate factually as to vitiate its usefulness, this Court has held that if there is evidence in the file which justifies the classification given, the determination of the Selective Service Appeal Board will be upheld. *Linan v. United States,* 202 F.2d 693, 694; *Reed v. United States,* 205 F.2d 216; *Knox v. United States,* 200 F.2d 398; *Cramer v. France,* 148 F.2d 801.

Appellant contends that since the Appeal Board followed the recommendation of the Department of Justice, any error could not be harmless. This position overlooks the independent nature of the Appeal Board. If the Appeal Board had evidence before it which would support the classification, it is immaterial on what basis the Department of Justice acted. Mr. Covington is actually contending that any inaccurate statement made anywhere along the line would require a Court to reverse the finding of the administrative body. We remind this Court that classification is not a judicial trial. *United States v. Nugent,* 346 U.S. 1; *Imboden v. United States,* 194 F.2d 508. Congress could not have intended that ob-

taining men for service in the armed forces should be hedged with a thousand pitfalls; that the slightest ambiguity should result in the loss of jurisdiction of the Selective Service System no matter how justified a classification might be. Selective Service is designed to raise an army for war. It must be able to do this unhampered by technical niceties so long as basic fairness is maintained. Any other requirement would make the processing of the ten million or so young men available for service impossible within the demands required by modern war.

The United States asks this Court to reject the standards and requirements demanded of the Department of Justice by Mr. Covington. The Department of Justice's recommendation was not arbitrary or capricious based on artificial or irrelevant grounds or contrary to the act and regulations. The recommendation under the evidence was proper. We respectfully ask the Court of Appeals to uphold it.

FRANKS IS NOT OPPOSED TO ALL WARS.

The Selective Service Board had a right to draw inferences from the evidence before it. *Imboden v. United States,* 194 F.2d 508. It was not required to accept every claim made by Franks, if in its opinion such a claim was inconsistent with material in the file, contradicted by inferences which could be drawn from the evidence, or not justified by the proof.

Franks, while claiming "strict neutrality" in wars in which the United States or any other country is a party, (File 15), approves certain wars; wars in the past which have been conducted with carnal weapons. (Neutrality 15-20, 22-24). He approves these on the ground that they were conducted by theocracies. He is conscientiously opposed, however, to wars conducted by the United States, because the United States perhaps is not holy enough. However, the United States has the right under the Universal Military & Training Act to require men to serve in the armed forces. It may do this despite the fact that the individuals involved do not approve of the government or the means or ends which it employs. The belief required by the Act for exemption is opposition to war in any form. If a Selective Service registrant approves of some wars, then he is not entitled to the exemption. Simply stated, a registrant may not chose his wars. *United States v. Kauten,* 133 F.2d 703, 708.

The defendant Franks takes the position of "strict neutrality" in wars between nations (File 15). In the pamphlet "Neutrality" which Franks introduced in evidence in his file, however, certain wars of the past are approved because they were theocratic wars. The wars of the old testament were waged by the people of the Kingdom of Israel, which in the viewpoint of the Jehovah's Witnesses was a theocracy and therefore could properly wage war. ("Neutrality," p. 18). It is the position of this sect that no Christian nation has had territory assigned to it by God as Israel did and consequently cannot fight a theocratic war.

("Neutrality," p. 16). It can be inferred that the position of the church is that defensive warfare conducted by theocratic governments is proper and Jehovah's Witnesses may serve therein.

Franks introduced in his file (page 19) a pamphlet entitled, "Neutrality," to which reference has previously been made.[2] On page 22 of this pamphlet statements are made concerning Jehovah's Witnesses and Pacificism:

> "A 'pacifist' may properly be defined as one who refuses to fight under any and all circumstances. The covenant people of God are not pacifists, even as God and Christ are not pacifists. God's covenant people are authorized to defend themselves against those who fight against the Theocratic Government. Nehemiah of Judah was in times of peace the official of the Persian government. He did not engage in building up military defenses for Persia. Because he remained neutral he was falsely accused as a seditionist. (Nehemiah 1:11; 2:1-20) Nehemiah devoted himself to building up and strengthening the interest of Jehovah's typical covenant people as against the anti-God forces. (Nehemiah 4: 7-23) His opponents conspired together to fight against Jerusalem and to prevent God's covenant people from carrying out the commandments of

[2]There is, of course, some difficulty in attributing to Franks all the statements therein contained. If the introduction of printed material were to be considered binding upon the board on the issue of the registrant's beliefs, exemption from military service could be obtained by merely investing the fifteen or twenty cents necessary to buy the type of pamphlet approved by the courts. Statements by the registrant himself certainly have more practical weight than statements of others.

> the Almighty. Therefore Nehemiah armed the servants of God, who worked with him, and commanded them to 'fight for your brethren.' "

Notice that Jehovah's Witnesses are authorized to defend themselves against those who fight against the theocratic government. In addition, the command of Nehemiah to fight for your brethren is approved. An individual who is willing to fight for his church is not conscientiously opposed to war under any circumstances. With this kind of belief the board could properly find an individual objected only to the particular war that the United States was then engaged in. Congress did not intend when granting the conscientious objector exemption, to satisfy the consciences of those people who objected to particular wars, but not to wars under any circumstances. *United States v. Kauten,* 133 F.2d 703, 708. Assuming but not conceding that Franks was motivated by religious considerations, nevertheless, if he did not claim to be opposed to any and all wars, he was not entitled to exemption as a conscientious objector.

Congress intended to defer that class of people who held religious scruples against the use of force. One who will fight and kill in defending his church cannot object if the United States requires that he fight and kill for his country. If the views expressed in the pamphlet introduced in Franks' file and copied in the appendix to this brief, represent his beliefs and those of the Jehovah's Witnesses sect on war, the United States submits that Jehovah's Witnesses and

the appellant do not have the opposition to war in *any* form which Congress made the basis of exemption from military service.

Franks, however, asserts that the organization has no official stand on participation in war (File 17). He must, therefore, stand or fall upon the beliefs he alone asserted. Examination of the file in this case will show that Franks presented many affidavits supporting the facts he was a Jehovah's Witness. However, he presented no affidavits or statements from others supporting the sincerity of his beliefs against force. The only evidence which he introduced on this question are statements made by him.

The Appeal Board was faced with a registrant who stated he believed in the use of force for self-defense (file 14); that he believed in "strict neutrality," and was willing to work in a naval shipyard (file 44). If the Court searches the file in this case it will not find any statements by Franks that he believed killing was wrong or immoral. The defendant only says he is religious. There is a great difference between finding a person religious and finding that he is conscientiously opposed to war. Catholics, Protestants and Jews can be fervently religious and yet serve in the armed forces. Franks' proof that he was a Jehovah's Witness is insufficient to bring him within the exempted class. A registrant must be considered available for military service until his elegibility for deferment is clearly established to the satisfaction of the Selective Service System. *Tyrrell v. United States,* 200 F.2d 8; *Seele v. United States,* 133 F.2d 1015; 1022.

CONCLUSION.

The United States respectfully submits that no error has been shown by appellant which would justify the trial Court in finding that the jurisdiction of the Selective Service Board has been exceeded. We, therefore, ask that the judgment of the trial Court be affirmed.

Dated, San Francisco, California,
March 8, 1954.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix

W. E. Sieivert

NEUTRALITY

(*The Watchtower* of November 1, 1939, contained the following on "Neutrality".)

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NEUTRALITY

"They are not of the world, even as I am not of the world."—John 17:16.

Jehovah is the God of peace: "The God of peace be with you all." (Romans 15:33) "And the very God of peace sanctify you wholly." (1 Thessalonians 5:23) Jehovah is not a pacifist, as that word is generally defined. In his own due time Jehovah makes war against those who blaspheme his name and defy Him and who oppose The Theocracy. "The God of peace shall bruise Satan under your feet shortly." (Romans 16:20) Jehovah God is always neutral in a controversy or war between nations or peoples who are on the side of Satan and a part of Satan's world.

Christ Jesus is "the Prince of Peace", and when his kingdom is fully in operation there will be no end to peace. (Isaiah 9:6, 7; Hebrews 7:1, 2) But Christ Jesus is not a pacifist. In God's due time and at God's command he makes war upon Satan and all of his organization and will completely destroy all the wicked. (Revelation 19:11; Psalm 110:2-4) When there is a controversy or war between those who are of Satan's organization Christ Jesus is always neutral as to the contending sides.

"Neutrality" means to decline or refuse to engage in a controversy or war which is between others, and particularly when such warring nations are unfriendly to the neutral one. In such controversies or wars the neutral one does not take the part of either side, but refuses to take up the fight of one as against

the other; and this is particularly true where the neutral one has no just cause to interfere.

JEHOVAH'S WITNESSES

The position of Jehovah's witnesses should be clearly and definitely defined, and that position must be fully supported by the Scriptures. Jehovah's witnesses are Christians, who follow the lead of Christ Jesus their Head in obeying the commandments of the Almighty God, and who are therefore wholly and entirely devoted to the kingdom of God, which is The Theocracy. The mere fact that one claims to be a Christian does not mean that he is in fact a Christian. His course of action must prove his claim. A Christian is one who has fully covenanted to do the will of Almighty God and therefore to be obedient to God's commandments even as Christ Jesus, the beloved and exalted Son of God, obeys Jehovah's commandments. As Christ Jesus is, so are his followers, Jehovah's witnesses, in this world.—1 John 4:17.

There is now war among some of the nations of earth. Some of the nations not actually at war have declared their neutrality. It will be difficult for the officials of the nations to clearly understand the real neutrality of Jehovah's witnesses, but their position must be so clearly stated that there may be no occasion to have any doubt as to where they stand and no doubt as to the correctness of the position they take or have taken.

ENTIRELY NEUTRAL

The true followers of Christ Jesus must follow where Christ Jesus leads, because they are called to take that exact course and they must be diligent to obey his and Jehovah's commandments. (1 Peter 2: 21) Wherever there is a conflict between the laws of the nations and the laws of Almighty God the Christian must always obey God's law in preference to man's law. All laws of men or nations in harmony with God's law the Christian obeys. The words of Jesus, spoken to his disciples, apply to all persons who have made a covenant to be obedient to Almighty God. Concerning such Jesus says: "They are not of the world, even as I am not of the world." (John 17:16) That Jesus intended this rule to apply to everyone who becomes a real Christian is proved by his words, as follows: "Neither pray I for these alone, but for them also which shall believe on me through their word." (John 17:20) Jesus is sanctified or set aside entirely to the work of his Father, Jehovah, and concerning those who agree to follow in his steps Jesus says: "As thou hast sent me into the world, even so have I also sent them into the world. And for their sakes I sanctify myself, that they also might be sanctified through the truth."—John 17:18, 19.

The world mentioned by Jesus consists of the nations of earth under the supervision of the invisible overlord, Satan. (2 Corinthians 4:4; John 12:31; 14:30) The world of Satan, therefore, consists of the invisible, called "heavens", and the visible, called

"earth"; and which world, in God's due time, will be completely destroyed. (2 Peter 3:7) Jehovah's witnesses are set aside and commissioned by Jehovah God to be the representatives on the earth of the Most High, the Great Theocrat. Jehovah's witnesses are not a political or religious organization, and they have no part in the political affairs of this world, not even of the nations wherein they have their domicile. The authority for this position is clearly stated by Jesus, to wit: "I have given them thy word; and the world hath hated them [like aliens and strangers], because they are not of the world, even as I am not of the world."—John 17:14.

Further addressing his true followers, the Lord Jesus says: "If ye were of the world [that is, a part of any of the nations participating in war with other nations], the world [that is, the rulers and supporters] would love his own; but because ye are not of the world, but I have chosen you [the followers of Christ Jesus] out of the world, therefore the world hateth you."—John 15:19.

The fact that the true followers of Christ Jesus, real Christians, are hated by the nations of earth is conclusive proof that such Christians must be neutral and not enter into any alliance with nations that are engaged at war with other nations. Some of the nations of earth, such as the United States, are now neutral toward other nations, but the United States or other neutral nations are not hated because of that neutrality. They are a part of the world and continue to have commercial dealings with the nations that are

at war. The position of Jehovah's witnesses is entirely different from that of the nations of earth. Jehovah's witnesses are entirely neutral for Jehovah's name's sake, and because thereof they are hated, as Jesus stated, "for my name's sake," and the sake of his Father's name. Jehovah's witnesses are entirely for the Theocratic Government of the Almighty God by Christ Jesus the King. The uninterrupted rule of Satan has ended, and therefore great woes have come upon the nations of the earth. (Revelation 12:12) Concerning the end of Satan's world the Lord Jesus says: "Nation shall rise against nation, and kingdom against kingdom"; and in this connection Jesus, further speaking concerning the Christian, says: "And ye [the followers of Christ Jesus] shall be hated of all nations for my name's sake." (Matthew 24:7-9) This alone proves that Jehovah's witnesses are entirely separate and apart from the nations of this world.

THE THEOCRACY

Many centuries ago Jehovah, the Almighty God, declared his purpose to set up the Theocratic Government, which is his kingdom by Christ Jesus, and which kingdom shall rule the earth in righteousness. In the year 29 (A.D.) Christ Jesus was anointed and commissioned as King of the Theocratic Government or Kingdom, which he declared would be set up at his second coming. Christ Jesus was entirely neutral toward nations when he was on earth. He did not instruct his followers to take sides with any govern-

ment or any nations of earth in their controversies, but he emphatically instructed all his true followers to devote themselves entirely to God's kingdom, The Theocracy. He urged upon them the necessity of always praying for the coming and full operation of The Theocracy: "Thy kingdom come. Thy will be done in earth, as it is in heaven."—Matthew 6:10.

He told his followers that the nations of this world seek entirely after material or selfish things, and then to his followers he said: "But seek ye first the kingdom of God, and his righteousness [that is, seek The Theocracy, and not democracy, totalitarianism, Fascism, or any other political government]; and all these things shall be added unto you." (Matthew 6:33) The Christian, that is to say, the true follower of Christ Jesus, who is for the government of Jehovah, could not take sides for or against any political government now on earth. Great religious organizations and the Fascists say, "We expect to rule the earth"; while the democracies say, "We will rule the earth"; and all of these are against Jehovah God's kingdom by Christ Jesus. That his followers might have no reason to take a wrongful course Jesus instructs them to give no concern to the affairs of this world, and then adds: "For all these things do the nations of the world seek after; and your Father knoweth that ye have need of these things. But rather seek ye the kingdom of God; and all these things shall be added unto you. Fear not, little flock; for it is your Father's good pleasure to give you the kingdom." (Luke 12:30-32) Here is the positive and

emphatic instruction that those who will have a part in the Theocratic Government, that is, in God's heavenly kingdom, must be entirely neutral with reference to earthly nations.

Every nation on earth, including those that are at war and those that are not now at war, endorses and practices religion, and religion and politics operate together, and not one of such nations is for the Theocratic Government of Jehovah, but all are against it. The nations of the earth pursue the selfish course for commercial and political gain. Some of these nations call themselves "Christian" nations, but they are all opposed to the kingdom of God by Christ Jesus. Every religious institution under the sun has some part in the affairs of this world, and therefore constitutes a part of this world; and that explains why the rulers of the nations of this world do not hate the religious systems, as Jesus stated his followers are hated for his name's sake. That proves that these religious systems are not for the name of Jehovah God nor for the name of Christ Jesus, but against God and his kingdom. The instructions given to those who are for the Theocratic Government are that their citizenship is in heaven and their duty is to be entirely loyal and faithful to the heavenly government by Christ Jesus. Concerning this it is written: "(For many walk, of whom I have told you often, and now tell you even weeping, that they are the enemies of the cross of Christ; whose end is destruction, whose God is their belly, and whose glory is in their shame, who mind earthly things [commercial, political and relig-

ious things].) For our citizenship is in heaven [*A.R. V.*]; from whence also we look for the Saviour, the Lord Jesus Christ." (Philippians 3:18-20) Mark this strong contrast pointed out between those who are Christians and those religionists, that is, who are of this world.

Does the Lord instruct his people to indulge in war for one nation against another nation? No; but, on the contrary, the emphatic instruction to the Christian is stated in these words: "Thou therefore endure hardness, as a good soldier of Jesus Christ. No man that warreth entangleth himself with the affairs of this [world]; that he may please him who hath chosen him to be a soldier."—2 Timothy 2:3, 4.

One could not be a soldier of Jesus Christ and at the same time a soldier of the nation that is under the supervision of God's enemy, the Devil. Hence the Christian does not entangle himself with the affairs of this world: "For though we walk in the flesh, we do not war after the flesh: (for the weapons of our warfare are not carnal, but mighty through God to the pulling down of strong holds;) casting down imaginations, and every high thing that exalteth itself against the knowledge of God [the great Theocratic Government], and bringing into captivity every thought to the obedience of Christ [the King of The Theocracy]." (2 Corinthians 10:3-5) Then the Christian is specifically instructed as to the warfare to which he is subjected: "For ours is not a conflict with . . . flesh and blood, but with the despotisms,

the empires, the forces that control and govern this dark world—the spiritual hosts of evil arrayed against us in the heavenly warfare."—Ephesians 6:12, *Weymouth.*

The war of one nation against another nation of the earth is not the fight of the followers of Christ Jesus. If the nations of this world desire to fight, that is their affair entirely, and it is not at all the affair of one who has made a covenant to be faithful to Almighty God and his King and Kingdom. The Christian must not interfere in the least manner with the war between the nations. The Christian is not to interfere with the drafting of men of either nation that goes to war. That is the affair of the nations of this world. The Christian must be entirely neutral, and this without regard to his place of birth or nationality. It is the privilege of each Christian to make his own position and relationship to the Lord clearly to be understood, that he is separate and apart from any of the nations of this world. Jehovah's witnesses have separated themselves entirely from this world by covenanting to be faithful to God's kingdom, and they have received the commission from Jehovah God to aid and comfort the peoples of the earth who seek righteousness, and that without regard to what nation such people may be subject to. They bring comfort to those who are seeking the right way, by declaring to them the name and the kingdom of Almighty God by Christ Jesus, calling their attention to the emphatic word of God that his kingdom is the only hope for mankind. (Isaiah 61:1, 2; Matthew 12:18-21) To

those who have covenanted to do God's will as followers of Christ Jesus he says: "Ye are my witnesses . . . that I am God"; that is, the Supreme One, and who gives peace and salvation to those who do his will. (Isaiah 43:10, 12; Psalm 3:8) Officials of the nations of this world and who have to do with the selecting of the army cannot have a proper appreciation of the scriptures hereinbefore mentioned, for the reason that they are of the world and have not devoted themselves to Almighty God. Concerning this it is written: "But the natural man [the man devoted to the things of Satan's world] receiveth not the things of the spirit of God; for they are foolishness unto him; neither can he know them, because they are spiritually discerned. For what man knoweth the things of a man, save the spirit of man which is in him? even so the things of God knoweth no man, but the spirit of God."—1 Corinthians 2:14, 11.

The fact that worldly men and officials do not understand and appreciate the clear distinction between the nations of this world and the great Theocratic Government of Jehovah God by Christ Jesus is no excuse for a Christian to yield to the demands of worldly nations. The Christian has made a covenant to be faithful to God and to his kingdom; and for the Christian to willingly break that covenant means his everlasting destruction. The position here announced of the Christian is nothing new, but was clearly set forth in the Scriptures long centuries ago for the guidance of the man of righteousness who has agreed to be faithful to Almighty God.

NEUTRALITY FORESHADOWED

Jehovah used the Israelites to set up a typical theocracy, which foreshadowed his real and great Theocracy, his kingdom by Christ Jesus. Abraham, Isaac and Jacob were faithful representatives of Jehovah God, and they were always neutral in the wars of other nations. Abraham had nothing to do with the fight between the rulers of Sodom and Gomorrah and their enemies. The invaders overran the land of Sodom and Gomorrah, and a great conflict raged between them. Abraham and Lot, his nephew, were there, but they took no part whatsoever in that war. (Genesis 14:1-3) After that war between the contending nations was all over and one side seized Lot and his property and fled with the same, Abraham did pursue the invaders, not because he was an ally of the defeated ones, but because one of the enemy had seized and carried away Lot, the "righteous man." (2 Peter 2:7, 8) Then Abraham pursued the invaders and recovered Lot, his nephew, and not because he was his nephew, but because Lot was a faithful servant of Almighty God. Thus the divine rule is established that one of God's devoted servants is justified in acting in behalf of his fellow servants, the servants of God. The rescue of Lot accomplished by the armed forces of Abraham was fully approved by Jehovah, as shown by the following scriptures: "And Melchizedek king of Salem brought forth bread and wine; and he was the priest of the most high God. And he blessed him, and said, Blessed be Abram of

the most high God, possessor of heaven and earth; and blessed be the most high God, which hath delivered thine enemies into thy hand. And he gave him tithes of all."—Genesis 14:18-20.

Abraham's neutrality and the fact that he was not in any alliance with either of the warring factions are further proved by his refusal to accept any reward whatsoever or any part of the spoils taken from the enemy. (Genesis 14:21-24) This proves that Abraham was not the servant of any earthly king, but that he was the servant and representative of Jehovah God, the great Theocrat. Abraham's neutrality was due to the fact that he was wholly devoted to the Theocratic Government, and therefore God addressed him as his "friend". This is further proved by what is written concerning Abraham, to wit: "By faith he sojourned in the land of promise, as in a strange country, dwelling in tabernacles with Isaac and Jacob, the heirs with him of the same promise; for he looked for a city [government] which hath foundations, whose builder and maker is God."—Hebrews 11:9, 10.

This scripture proves that he was a stranger and did not act as a native nationalist, putting the state above Almighty God. He dwelt in tents with Isaac and Jacob, and thus showed himself separate and apart from the others and that he was a noncombatant. He was a sheep herder, engaged in a peaceful business, and had no part in the affairs of the government in the land where he resided. He had his mind and heart set upon God's kingdom, the Great Theoc-

racy; and further it is written concerning him: "Therefore sprang there even of one, and him as good as dead, so many as the stars of the sky in multitude, and as the sand which is by the sea shore innumerable. These all died in faith, not having received the promises, but having seen them afar off, and were persuaded of them, and embraced [saluted] them, and confessed that they were strangers and pilgrims on the earth."—Hebrews 11:12, 13. (See Diaglott, Rotherham's, and Young's translation.)

He "saluted" and thus attributed salvation to Almighty God, and hence he did not salute the flag of those worldly governments and attribute salvation and protection to them. He did not look for protection or salvation from any earthly government, and therefore it is written concerning him: "For they that say such things declare plainly that they seek a country. And truly if they had been mindful of that country from whence they came not, they might have had opportunity to have returned."—Hebrews 11:14, 15.

He could have returned to those governments whence he came by saluting their flag, and thus denying Jehovah God. And why did he not do so? The Scriptures answer: "But now they desire a better country, that is, an heavenly [that is, The Theocratic Government of Jehovah by Christ Jesus]: wherefore God is not ashamed to be called their God; for he hath prepared for them a city."—Verse 16.

TYPICAL

Abraham's neutrality was typical, and furnishes the true and correct guide for the Christians, who form a part of God's "holy nation"; and concerning which it is written: "But ye are a chosen generation, a royal priesthood, an holy nation, a peculiar people; that ye should shew forth the praises of him [Jehovah, the Great Theocrat, by faithfully representing him and his government, and not by showing forth the praises of men] who hath called you out of darkness into his marvellous light."—1 Peter 2:9.

Further showing that the true followers of Christ Jesus are separate and distinct from the nations of this earth, the scripture continues: "Dearly beloved, I beseech you as strangers and pilgrims [that is, not native nationalists or any part of Satan's world], . . . having your conversation [behavior, course of action] honest among the Gentiles [nations]; that, whereas they speak against you as evil doers, they may by your good works [of faithfully representing Jehovah's theocratic government by always bearing testimony to his name and kingdom by the course of action you take], which they shall behold, glorify God in the day of visitation [that is, the coming of distress and trouble upon the nations of the earth at Armageddon]."—1 Peter 2:11, 12.

The only reason for any of the true followers of Christ Jesus to now be upon the earth is that they might bear witness to the name of Jehovah God and proclaim his kingdom. By remaining absolutely and

entirely neutral in the controversies and wars between the nations, these Christians stand forth for the witness of the Most High and thus fulfill their commission, maintain their integrity, and prove their faithfulness to Almighty God and his King.

There was a time when those who are now Jehovah's witnesses were a part of this world, but, having made a solemn covenant to do the will of Almighty God and having become the true followers of Christ Jesus, such are no longer any part of the world. "That at that time [as citizens of the world and hence a part of earthly governments] ye were without Christ, being aliens from the commonwealth of Israel, and strangers from the covenants of promise, having no hope, and without God in the world; but now, in Christ Jesus, ye who sometimes were far off, are made nigh by the blood of Christ. Now therefore ye are no more strangers and foreigners, but fellow-citizens with the saints, and of the household of God; and are built upon the foundation of the apostles and prophets, Jesus Christ himself being the chief corner stone."—Ephesians 2:12, 13, 19, 20.

Being in Christ Jesus, one can no longer take sides in the controversies and wars between the peoples and nations, all of which nations are against Jehovah's kingdom: "If ye then be risen with Christ, seek those things which are above, where Christ sitteth on the right hand of God. Set your affection on things above, not on things on the earth. For ye are dead, and your life is hid with Christ in God. When Christ,

who is our life, shall appear, then shall ye also appear with him in glory."—Colossians 3:1-4.

The truly covenant people of Almighty God now in earth are not pro-"foreign power", nor hyphenated nationalists, with a divided human allegiance; they are not propagandists for either side of the warring factions. They are separate and distinct from all such and are solely the witnesses of Jehovah God and his Theocratic Government, and hence they must stand aloof from every nation of this world. They must declare the kingdom of God, and without doing so they cannot be faithful to God and receive his approval and salvation to life. To them obedience to the world means everlasting destruction; obedience to Almighty God means everlasting life. What, then, must they do? They must be witnesses for the Lord and obey his commandments by pointing the people to his King and his Kingdom.—Matthew 24:7, 14.

ISRAEL'S WARS

It has been claimed that the wars of the nation of Israel against other nations is proof that wars between nations may be properly indulged in and hence that Christians should join with other nations in making war. Such reasoning finds no support whatsoever in the Scriptures. The nation of Israel was not organized by any political ruler or dictator or usurper. That was God's typical nation, formed and organized by the great Theocrat for the purpose of picturing the real Theocracy that shall rule the world

by Christ Jesus. Israel had no man-made laws and no political parties and no religious advisers to direct the political affairs. This was true as long as that nation remained faithful to God. God chose the earthly location for his typical theocratic nation, as it is written: "A land which the Lord thy God careth for; the eyes of the Lord thy God are always upon it, from the beginning of the year even unto the end of the year." (Deuteronomy 11:12) "When the Most High divided to the nations their inheritance, when he separated the sons of Adam, he set the bounds of the people according to the number of the children of Israel." (Deuteronomy 32:8) Jehovah God, the great Theocrat, was the ruler of that typical nation Israel, and his will the only law of the nation.

The land assigned to Israel was held in possession previously by the Canaanites and others who were devoted to devil-worship, and who therefore were against Jehovah God. That land God had given to Abraham and to his seed after him. (Genesis 13:14-17; 15:18-21; Psalm 105:8-12) The Canaanites, who were against God, refused to surrender possession to God's chosen people and refused to come over on the side of the great Theocrat, and therefore they must be ousted. The only exception was the people of Gibeon, who voluntarily put themselves on the side of Jehovah and who therefore received protection and deliverance at the hand of God's chosen servant, Joshua. Israel's wars against the Canaanites were carried on by the direction of Jehovah God.—Deuteronomy 7:1; Exodus 34:24.

Joshua, whose name is the same as Jesus and who foreshadowed Christ Jesus, carried on such wars by the direct command of the Almighty God, and Joshua gained the victory for that reason.—Joshua chapters 9 and 10; Joshua 11:20-23.

Israel was the only nation of earth to which God ever assigned any territory and authorized them to take possession of it by force. Hence the wars of Israel for gaining possession of what belonged to them by the gift of Almighty God foreshadowed Christ Jesus' taking possession of the entire earth, a gift to him from Jehovah God, and Christ acts under the command of the Almighty. (Psalm 2:6-12) The Israelites did not invade that which belonged to others. They took the land that belonged to them by a gift from Jehovah. Their participation in war was by the command of the Almighty God, and their obedience to his commandment was more acceptable than sacrifice. (1 Samuel 15:20-23) Such wars were righteous; hence God heard and answered the prayers of his typical people as long as they obeyed him. Victory was not granted to them by reason of their superior military equipment, but because God exercised his almighty power in their behalf. (Johsua 10:14) King David carried out God's command in taking possession of the entire domain which the great Theocrat had assigned to His typical people. (2 Samuel 8; 1 Kings 4:21) Thus he pictured the Greater David, Christ Jesus, taking possession of the entire earth.

When the Israelites violated their covenant with God he permitted them to be punished by their enemies, and they never gained the victory over their enemies under such circumstances. But when the Israelites repented and turned to God he drove out their enemy invaders and gave Israel the victory. (Judges chapters 6 and 7) All these things happened to Israel for types and were written and recorded for the advice and guidance of faithful Christians now on the earth. (1 Corinthians 10:11) None of the nations of "Christendom" ever had any territory assigned to them by the great Theocrat, Jehovah. The so-called "Christian" nations have taken possession of land by what they call "the right of discovery" or by purchase or by conquest, and not by God's will. "Christendom" is the antitype of unfaithful Israel, which unfaithful people lost the whole land by reason of their unfaithfulness to God. "Christendom," that is, the so-called "Christian" nations, are without any authority whatsoever from Almighty God to engage in war and with his approval and blessing. Hence the wars between the nations of the earth, even defensive wars, find no support or justification in the wars that Israel engaged in. There is nothing, therefore, that would justify the true Christian in obeying the political and religious rulers in taking up arms for aggressive war or even for defensive war of one worldly nation against another worldly nation. If the nations of "Christendom" or any other nations of earth desire to engage in war and do so, that is their affair, and it is the duty of God's covenant people to remain entirely neutral as to such wars. Religious leaders,

forming a part of this evil world, insist that Christians should engage in war between nations, citing the experiences of Israel as authority. The most powerful religious organization on earth now attempts to justify war, that is, war now raging between the nations, and hence the Roman Catholic Hierarchy of Authority urges the religionists of the various nations to take sides and go to war. Evidently they have overlooked their own previously announced conclusions upon this point. Some conscientious member of the Hierarchy at one time wrote and published the correct position in this matter, to wit: "Here, also, it is to be noted that nations cannot draw a parallel from the Old-Testament titles. The Israelites lived under a theocracy; God, as Supreme Lord of all the earth, in specific instances, by the exercise of His supreme dominion, transferred the ownership of alien lands to the Israelites; by His command they waged war to obtain possession of it, and their title to war was the ownership (thus given them) of the land for which they fought. The privation thus wrought upon its prior owners and actual possessors had, moreover, the character of punishment visited upon them by God's order for offences committed against Him. No state can find such title existing for itself under the natural law."—*The Catholic Encyclopedia,* Volume 15, under the heading "War", and subtitle IV, page 548, column 2.

Contrary to their once announced correct doctrine, the Catholic clergy in various nations now advise the "Catholic population" to participate in a war, evi-

dently reasoning that their failure to do so would cause the Hierarchy to lose much financial support. It is therefore apparent that they are willing to repudiate their former and once correct position and sacrifice human lives in order to maintain their own present position with the parts of this wicked world.

The Scriptures furnish no precedent or authority for a Christian to engage in war for one nation as against another, for the manifest reason that all such nations are against the great Theocratic Government and hence the fight between the nations is not the fight of one who is in a covenant to do the will of the Almighty God. The Israelites' wars, which Jehovah approved, were for the purpose of taking possession of their own land. Outside of their own territory assigned to them by the Lord they were not authorized to extend their warfare to any more territory at any time.—See Deuteronomy 2:1-9, 19, 37.

When the holy land was invaded by other nations the Israelites were authorized to fight in a defensive war against such invaders. Specific examples are found in the Scriptures in reference to invasion by Egypt, Ethiopia, Syria and Assyria, and in which Jehovah not only approved the action of his typical people but came to their defense and fought their battles for them. (2 Kings 18:9-37; 19:1-36; 2 Chronicles 14:9-15) When the internal enemy who was against God and his people rose up against them in war they were authorized to fight in self-defense and to subdue the anti-theocratic uprising. Such was the

rule that God gave to the Israelites.—See Judges, chapters 3 to 16.

In the wars that raged between the nations in the outside world beyond the boundaries of the Theocratic territory of Israel the Israelites were commanded to remain neutral, and did remain neutral as long as faithful to Jehovah. When they violated that neutrality they suffered defeat and did not have God's help. (2 Kings 23:29-35; 2 Chronicles 35:20-24) This rule governing the typical theocracy fixes the rule by which those who are of the real Theocracy must be guided.

"CHRISTENDOM" NOT THEOCRATIC

There is no so-called "Christian nation" of so-called "Christendom" that is a theocracy, or any part thereof, because not one of such nations even claims Almighty God as the Ruler. All these nations are ruled according to man's law. If such nations had Jehovah God for ruler the political power could not enforce conscription laws. The law of the political governments is not theocratic. Since God commands all of his covenant people to keep themselves aloof from the world and thereby devote themselves entirely and wholly to his kingdom, no person in a covenant to do the will of God is under obligation to take up arms for one political government as against another political government. The interest of the state and the interest of God's theocratic government are not common. The ordinances or laws of the state do not

express the will of Almighty God, because God has not authorized any political nation to act for him in declaring and making war on another nation. Exactly the opposite is the Scriptural rule: "Jesus answered, My kingdom is not of this world [of which 'Christendom' is a part]; if my kingdom were of this world, then would my servants fight, that I should not be delivered to the Jews; but now is my kingdom not from hence [not from the source of 'Christendom']." (John 18:36) Again says the Word of the great Theocrat: "Blessed is the nation whose God is Jehovah, the people whom he hath chosen for his own inheritance." (Psalm 33:12, *A.R.V.*) Not one nation within the realm of so-called "Christendom" has Jehovah for its God and Ruler, but all such nations hate Jehovah God and his government by Christ Jesus and hate those who bear testimony to his name and his government. (Matthew 24:9) In Germany there are some Christians that are truly and fully the covenant people of God. Why should they fight for Hitler and his gangsters that defy the Almighty God and persecute those who serve Jehovah God and Christ Jesus? Some of these faithful Christians have recently been, as the press announces, executed, that is, put to death, because they would not bear arms at the command of Hitler. Thus the executed one proved his integrity and faithfulness to the great Theocratic Government and is guaranteed resurrection and life everlasting; which no gangster such as Hitler will ever get.—Revelation 2:10.

THEOCRACY

The Theocracy is the heavenly, invisible government of Jehovah God by Christ Jesus, the King, who is invisible to human eyes. (Isaiah 9:6, 7) That government is not allied with or represented by any religious, political, judicial government on the earth. If the church-state governments were a part of God's Theocracy, then there would be only one government, under one Leader, Christ Jesus. Hence there could be no war between them. There would be no international division, and no rivalry, and hence no bloody conflict between the peoples of those nations. Neither would the clergy of one of such nations pray to some reputed "god" to favor one of such countries at war as against another nation at war. Christ is not divided. The Theocracy is one inseparable, righteous government, always righteous. (1 Corinthians 1:10-13; 3:1-4) It follows, therefore, that Jehovah must be neutral, and hence his ear is deaf to the prayers of clergy of all sides of the war between the nations. Jehovah God hears only the prayers of those who are for his Theocratic Government. (1 Peter 3:12) A religious state is anti-Theocracy, and to such state God shows no favors over another like state or nation. Jehovah God is neutral, and his covenant people who have vowed to serve him and his Theocracy must therefore remain neutral, depending wholly and entirely upon God for protection and salvation.—2 Corinthians 10:3, 4.

SELF-DEFENSE

A "pacifist" may properly be defined as one who refuses to fight under any and all circumstances. The covenant people of God are not pacifists, even as God and Christ are not pacifists. God's covenant people are authorized to defend themselves against those who fight against the Theocratic Government. Nehemiah of Judah was in times of peace the official of the Persian government. He did not engage in building up military defenses for Persia. Because he remained neutral he was falsely accused as a seditionist. (Nehemiah 1:11; 2:1-20) Nehemiah devoted himself to building up and strengthening the interest of Jehovah's typical covenant people as against the anti-God forces. (Nehemiah 4:7-23) His opponents conspired together to fight against Jerusalem and to prevent God's covenant people from carrying out the commandments of the Almighty. Therefore Nehemiah armed the servants of God, who worked with him, and commanded them to "fight for your brethren".—Nehemiah 4:1, 14.

Likewise Zerubbabel, who was commanded by Jehovah to rebuild the temple at Jerusalem. (Ezra 1-11; 2:1, 2; 3:1-13) He did not devote himself to the building up of military defenses of Medo-Persia; and because he remained netural as to the political state Zerubbabel was accused of sedition, which charge was false. (Ezra 4:6-24) But Jehovah God protected and blessed Zerubbabel in his work in behalf of the covenant people of God. (Ezra 5:1-17; 6:1-22) Thus God's rule is fixed. Likewise Jehovah's witnesses to-

day, in caring for the interest of The Theocracy by arranging for and holding public meetings and there proclaiming the name of Jehovah and his King, and by advertising the kingdom as commanded, have the right to defend themselves against the assaults of the anti-God, anti-Kingdom crowd who would hinder such work which God has commanded them to do; and in defending themselves they have the approval of the Almighty.—See *The Watchtower,* "Doom of Religion," September 15, 1939, page 279.

Being entirely neutral as between the nations of earth Jehovah's witnesses do not pray to God for one political ruler as against another. They do not pray, as commanded by the ruler of any earthly government, for the success of the armies of one nation against another, but they pray as Jehovah God, by Christ Jesus, has commanded them to pray, to wit: 'Thy kingdom come. Thy will be done on earth as it is done in heaven.' (Matthew 6:10) God's people are now living on the earth practically under all earthly governments, and it would be entirely inconsistent for them to pray for one government as against another, and particularly in view of the fact that all of such earthly governments are against God's kingdom. Jehovah's witnesses pray to their Father in heaven, who is eternal, and who is neutral as to all earthly governments, and who declares that in his own due time he will by the hand of Christ Jesus completely destroy all governments that are opposed to and against The Theocracy, for the reason that such opposing governments are under the hand of Satan.

Jehovah's neutrality is further proved by the fact that he ordered his anointed King, following his resurrection, to take no action for or against any other nation on earth until due time for the Theocratic rule to begin. He commanded Christ Jesus to remain inactive toward all such nations until God sends him forth to rule; which He did in 1914: "The Lord said unto my Lord, Sit thou at my right hand, until I make thine enemies thy footstool. The Lord shall send the rod of thy strength out of Zion; rule thou in the midst of thine enemies." (Psalm 110:1, 2; Hebrews 10:12, 13) At the end of the world, that is, after the time came for Satan to be ousted, God sent forth his King to rule. That did not mean that Jehovah was taking sides between the nations which rise up against each other in war (Matthew 24:7, 8), nor did Jesus tell his faithful followers to take sides, but, on the contrary, he commanded them to go about amongst all the nations and preach the good news, giving testimony that Satan's world had ended and that the kingdom of righteousness is at hand, which shall vindicate Jehovah's name and bring blessings to the obedient people. (Matthew 24:14) The end of Satan's world has come, and God by Christ Jesus takes a hand in completely ousting Satan and all of his supporters from the earth because the earth belongs to Christ Jesus as a gift from Jehovah God.—Psalm 2:8, 9.

The rule by which Jehovah's covenant people must now be governed is that of strict neutrality between the nations at war. It is the privilege of all nations

to fight it out amongst themselves, but the Christian must not interfere, by word or act, with the governments in any action they may take with reference to the conscription of men or material for the war. The covenant people of God must keep their hands off, because it is not their fight and it would be wrong to induce others not to fight. Each one must determine for himself his relationship to God and his government.

Jehovah favors no political nation as against another like nation. In due time he expresses his wrath against all such nations, because all are against his kingdom. "Come near, ye nations, to hear; and hearken, ye people; let the earth hear, and all that is therein; the world, and all things that come forth of it. For the indignation of the Lord *is upon all nations,* and his fury upon *all their armies;* he hath utterly destroyed them, he hath delivered them to the slaughter." (Isaiah 34:1, 2)—Jeremiah 35:31, 32; Zephaniah 3:8; Haggai 2:22; Revelation 11:17, 18.

DIVIDING THE PEOPLE

Jehovah assumes no responsibility for national division, that is, for one system of government of men as against another system of government. On the contrary, Christ Jesus, Jehovah's King, is now present, judging and separating the people of all nations into two classes, that is to say, the obedient ones in one class, designated as "sheep", and the disobedient or opposing ones, designated as "goats". (Matthew

25:31-46) The questions or issues upon which the individual division takes place and which all such individuals must by their course of action answer are these: Are you for the Theocratic rule by Christ Jesus the King? Do you, on the contrary, favor the continuation of Satan's rule by the political and religious elements of this world? Each individual must choose for himself.

Jehovah's covenant people stand aloof from the nations that are anti-Theocracy, and they must remain neutral as to all such nations. There is but one nation that has Jehovah's approval, and that is his "holy nation", composed of Christ Jesus, the Head and Ruler, and all those who fully support and are associated with Christ Jesus. (1 Peter 2:9) These faithful followers of Christ Jesus, in order to live, must prove their integrity and remain true and faithful to Jehovah and his King. Now the nations of earth, controlled by the religious and political rulers, conspire together to cause God's covenant people to be cut off from being a holy nation. (Psalms 83:2-18; 2:2-6) As to all such opposing nations, they are the enemies of God and of his covenant people, and therefore the covenant people must not mix up with or become a part of any such opposing nations.

What shall be the end of those nations that oppose the Theocracy and that persecute the faithful witnesses and their "companions", who obey the commandments of God by preaching this "gospel of the kingdom"? Jesus answers that question as follows:

"And shall not God avenge his own elect, which cry day and night unto him, though he bear long with them? I tell you that he will avenge them speedily. Nevertheless, when the Son of man cometh, shall he find faith on earth?"—Luke 18:7, 8.

Even if some nations of earth have heretofore declared that they are God's nation, it is certainly true now that every nation on earth has forgotten God and now opposes his Theocratic government. Because they oppose that kingdom and those who work under the King's supervision, all such nations are wicked and their end is fixed. "The Lord is known by the judgment which he executeth; the wicked is snared in the work of his own hands. . . . The wicked shall be turned into hell, and all the nations [(Hebrew) *goyim*] that forget God." (Psalm 9:16, 17) Concerning such Jehovah directs his covenant people to pray: "Arise, O Lord; let not man prevail; let the heathen [(Hebrew) *goyim;* nations] be judged in thy sight. Put them in fear, O Lord; that the nations may know themselves to be but men." (Psalm 9:19, 20) "O God, the heathen [(Hebrew) *goyim*] are come into thine inheritance; thy holy temple have they defiled; they have laid Jerusalem on heaps." "Pour out thy wrath upon the heathen that have not known thee, and upon the kingdoms that have not called upon thy name [in spirit and in truth and without hypocrisy]." (Psalm 79:1, 6; 2 Timothy 3:5) (Isaiah 64:1, 2; Revelation 11:17, 18) It would be entirely inconsistent and in disobedience to God's commandments for any cove-

nant child of his who supports His Theocracy to line up with and fight for one earthly nation as against another earthly nation, both of which nations are against the Theocratic Government. Therefore the position of Jehovah's witnesses is complete neutrality.

Without a question of doubt every nation of earth has violated the everlasting covenant of God concerning the sanctity of life. This they have done by wrongfully killing human and beast creation, and particularly by killing those who are devoted to God, and whom they have killed because such were faithful to Jehovah God. (Genesis 9:4-6, 16, 17) The only justified killing of any human creature is in self-defense or as God's executioner. (Exodus 22:2) No nation on earth has ever claimed that it is free from the wrongful taking of the lives of others and which has been done in disregard of God's law. Concerning all such it is written: "The earth also is defiled under the inhabitants thereof; because they have transgressed the laws, changed the ordinance, broken the everlasting covenant."—Isaiah 24:5.

UNSPOTTED

Those who are for the great Theocracy and who have therefore made a solemn covenant to do the will of Almighty God, the great Theocrat, must keep themselves unblemished and uncontaminated from the affairs of the nations of earth, which are against the great Theocrat; as Jesus plainly declared: "They are not of the world, even as I am not of the world. Sanc-

tify them through thy truth; thy word is truth." (John 17:16, 17) By the truth of Jehovah's Word they are completely set aside to his exclusive service. Therefore such are commanded to 'keep themselves unspotted from the world'. (James 1:27) "Unspotted" means to be free from blemish and from mixing up with the affairs of this world. Those who worship God in spirit and in truth must do that very thing. Such constitutes the true worship of Almighty God. There has crept into the Authorized Translation of the Bible, in James 1:27, the word "religion", which is improperly there. The correct translation of that text is as follows: "For the worship that is pure and holy before God the Father, is this: to visit the fatherless and the widows in their affliction, and that one keep himself unspotted from the world."—James 1:27, Murdock's Syriac.

Within the realms of warning nations there doubtless are many who have devoted themselves to Jehovah God and his kingdom by Christ Jesus. Those respective nations by law conscript the man-power and send men to war against other men. That is the affair and responsibility of each of such nations, about which true neutrals have nothing to say. Public officials who have to do with conscription and the hearing of applications for exemption from military service do not understand and appreciate the relation of Jehovah's witnesses and their "companions", the "other sheep" of the Lord, to Jehovah, the great Theocrat, and Christ Jesus. In order to induce Christians to with-

draw their application for exemption from military service the conscription officer propounds this question: "Would you defend your mother from attack?" Of course, the Christian would give the answer which the Lord Jesus gave, because such is the Scriptural answer, by which he is governed. It is not for one person to decide for another what answer should be given, but the Lord himself fixes the matter. Each person must decide for himself his own relationship to God and Christ. Christ's definition of who is the mother or brother of one of the covenant people of Jehovah God furnishes the true and correct guide for all Christians. Jesus was instructing the people, and concerning those who would love him and his kingdom he said: "He that is not with me is against me; and he that gathereth not with me scattereth abroad." —Matthew 12:30.

Necessarily one who is against the King is not for him, and one who is for the King cannot be against him. (Mark 9:40) The two texts above referred to are in exact harmony. Stated in common phrase, the position of every person is either for the King and his kingdom or against the King and his kingdom. There is no middle ground. At that point of his discourse to the people the following took place and these words were uttered by Christ Jesus: "While he yet talked to the people, behold, his mother and his brethren stood without, desiring to speak with him. Then one said unto him, Behold, thy mother and thy brethren stand without, desiring to speak with thee. But he

answered and said unto him that told him, Who is my mother? and who are my brethren? And he stretched forth his hand toward his disciples, and said, Behold my mother and my brethren! For whosoever shall do the will of my Father which is in heaven, the same is my brother, and sister, and mother."—Matthew 12:46-50.

Further, Jesus clearly defined the relationship of of those who do the will of Jehovah God: that all who sincerely do the will of God by obeying his commandments occupy the relationship to each other as brother, sister, and mother, that is, the family relationship of the family of God. The fact that one has a brother and sister and mother after the flesh but who are against the Theocracy by Christ Jesus does not at all mean that the Christian is under any obligation whatsoever to care for or protect such opponent of the kingdom.

The Scriptural answer to the propounded question, therefore, is this: If the one who is called "my mother" is against the kingdom of Jehovah by Christ Jesus, then the only duty I have towards such is to tell her of God's provision for mankind. If she is really devoted to God and his kingdom, then as my real relative in Christ Jesus I will do whatsoever I can for her protection and defense; but that does not mean that I must fight against the nation or people that is fighting another nation, both of which are against God and his kingdom. As to such nation I am entirely neutral and cannot and will not fight for one

as against the other. If an enemy of the great Theocracy and His King attempts to do me harm and to hinder me and my work for the kingdom and fights against me and my spiritual mother or brother, then I have the right to defend myself against such assaults, and the right to defend my brethren, and I will do so.—Nehemiah 4:14.

Thus the Christian clearly defines himself as for peace and righteousness but not as a pacifist.

CHRISTIAN'S POSITION

The position of the true follower of Christ Jesus is clearly set forth in the Scriptures. Such follower of Christ Jesus cannot compromise. One is either for The Theocracy or against that righteous government. If for the Theocratic Government and His King, then he is not going to compromise in order to escape hatred or punishment at the hands of enemies. He is now in a position to prove his integrity toward God and to prove that the Devil's challenge to Jehovah is a wicked lie. (Job 2:5) Therefore as a follower of Christ Jesus he can be faithful and true to God, and will do so, come what may.

Jehovah the great Theocrat has now enthroned his King and sent him forth to rule. (Psalms 2:6; 110:2; Revelation 11:17) Christ Jesus is now at the temple of Jehovah conducting his judgment of the nations. God's "strange work" of exposing the fallacy and the hypocrisy of religion, and pointing the people to the fact that The Theocracy is the only hope for the

peoples, is now in progress, and that work will be finished in his due time. (Isaiah 28:21; Matthew 12: 18-21) The Lord's "other sheep", the "great multitude" (Revelation 7:9-17), are now hastening to take their stand on the side of Jehovah and his King. The "strange work", when completed, will be quickly followed by God's act, "his strange act", at the battle of the great day of God Almighty called "Armageddon", and at which battle all the opponents of The Almighty will die. Only those who have declared themselves for The Theocracy and who maintain their integrity shall live. Some of them may be killed by the enemy because of their faithfulness, but such have the promise of resurrection to life. Therefore all who receive protection and salvation from Jehovah must prove their integrity to the great Theocrat and to his King. No one who is devoted to the Theocratic Government and its King will fear what man can do to him. He will fear God and obey him. (Isaiah 8:13, 14) Let all the faithful ones keep in mind the words of Christ Jesus spoken to them: "And fear not them which kill the body, but are not able to kill the soul; but rather fear him which is able to destroy both soul and body in hell." (Matthew 10:28) "But he that shall endure unto the end, the same shall be saved." (Matthew 24:13) It is far better to die faithful to God and because of faithfulness and receive at the hands of the Lord everlasting life than to compromise with any part of Satan's organization and suffer everlasting destruction. Concerning the faithful it is

written that those who now die faithful shall have an instantaneous resurrection from death. (1 Corinthians 15:51, 52) Jehovah God is the fountain of life, the everlasting Father, and the Giver of life to those who obey him, which gift he makes through Christ Jesus, his beloved Son. (John 3:16; Romans 6:23) "Salvation belongeth unto Jehovah," and not to man nor to any organization of men. (Psalm 3:8) There is no room for compromise with the enemy. Remember that God has said to his people concerning the enemy: "And they shall fight against thee, but they shall not prevail against thee; for I am with thee, saith the Lord, to deliver thee."—Jeremiah 1:19.

Those who have taken their stand on the side of the great Theocrat and his King will stand fast in that position, trusting in and relying solely upon God, well knowing that God will deliver them and grant unto them everlasting life. All who are on the Lord's side will be neutral as to warring nations, and will be entirely and wholly for the great Theocrat and his King.

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FOR THE NINTH CIRCUIT.

WILLIAM EDWARD FRANKS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division.

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

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Appellee.

REPLY BRIEF FOR APPELLANT

Appeal from the United States District Court for the Northern District of California, Southern Division.

May It Please the Court:

The arguments of appellee shall be answered in the order in which they appear in appellee's brief.

I.

An extensive argument is made on the scope of review by the courts in cases arising under the draft laws. (See pages 5-6, 7-11.) This identical argument was made by the Government in the brief for appellee at pages 15-19, in *Brown* v. *United States,* No. 14,101. This same argument

has been answered in the reply brief for appellant in *Brown* v. *United States* at pages 2-6. The argument appearing in that reply brief at such pages is adopted here and the Court is referred to it as though it were copied at length herein.

II.

Appellee challenges the statement of the elements that make up the proper definition of a conscientious objector under the act.—See the brief for appellee, at pages 11-14.

Appellee places emphasis on the use by appellant of the word "object." This word is placed in italics on page 11 of its brief. The use of the word "object" is proper. It fits in well with the term "conscientious objector." It is synonymous to the word "oppose" used in the act. There is no difference between "oppose" and "object" for the purposes of the act and the regulations. But assume that "oppose" is the proper word, still the argument of the appellant remains unchanged. The strength of the argument is not in the least bit weakened by substitution of the word "oppose" for the word "object."

The appellee jumps the track in the train of proper argument under the statute. The erroneous theme of "opposition to war" is made the fabric of the statute (pages 12-14). This entire argument was rejected in *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953), and *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. Jan. 8, 1954). The Supreme Court rejected this construction of the statute argued by the Solicitor General in his petition for writ of certiorari in *United States* v. *Taffs,* No. 576, October Term, 1953. The denial was on March 15, 1954, 74 S. Ct. 532.

A reading of the statute and the opinions in *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953), and *United States* v. *Hartman,* 209 F. 2d 366 (2d Cir. Jan 8, 1954), will show that Congress was dealing with opposition to participation in the armed forces by training and service and not opposition to war as such. This is thoroughly demonstrated in the argument made by appellant in the

brief for appellant in No. 14,105, *Shepherd* v. *United States,* on the docket of this Court. Reference is here made to the argument under Point Three of that brief at pages 35-43 for a more complete answer to the argument of the Government under this point.—See also the reply brief for appellant in that case at pages 1-4.

III.

The argument that the Government makes under the heading "Materiality of War Work" is subversive of the intention of Congress. It ignores completely the criterion of opposition to participation in the armed forces. The Government injects the vague and indefinite dragnet of opposition to war into the statute so as to nullify completely the plain purpose of Congress in passing the law.

Congress in making the law was dealing only with raising an army. Exemption from becoming a soldier was given to many different classes of registrants. The performance of a certain type of work outside the army exempted the most of the ones excused from training and service. Pursuit of the vocation of minister is an outstanding exemption. Farming, essential work in the national defense industry and service to the state or federal governments in different capacities are the most common exemptions. The status of severe hardship and conscientious objection are other deferments not based on occupation or work.

The deferred status of hardship or conscientious objection does not at all depend on the type of work that the registrant is willing to perform, whether in a defense plant or not. The statute nowhere makes the kind of work done by a registrant claiming deferment as a conscientious objector before induction an element to consider. The only time that the type of work performed or willing to be performed by a conscientious objector is material (and then it is after induction, not work before that is involved) is when it is shown that he performs combatant service or is willing to perform combatant service. Then and only then can it be said that the service performed or willing to be performed

by the registrant disproves conscientious objection to service.

The Government argues that, by the use of the word "conscientiously" in the statute, it can apply its own arbitrary ideas as to what constitutes a conscientious objector. The word "conscientiously" used by Congress in the statute was not a vague and indefinite dragnet placed in the hands of the Department of Justice. Use of the word does not allow the Government to write its own definition of what a conscientious objector is. The definition appears in the statute. If the words of Congress in the definition are given their ordinary and reasonable interpretation, nowhere therein can it be found that the type of work of a civilian work willing to be performed by a conscientious objector is material.

It is true that Congress classified the type of work that a conscientious objector can be drafted to do. It is anything that contributes to the health, safety and welfare of the nation. So long as it is of a civilian nature it must be done when ordered by the draft board to be done by the conscientious objector under the act. What is there in the act or the regulations to prevent a draft board from ordering a conscientious objector to do work in a war plant? Nothing! Since a conscientious objector could be ordered to do work of a civilian nature contributing to the national welfare in a defense plant, then how can the Government now say that because a man says he is willing to do work in a war plant he is not a conscientious objector? The argument of the Government is incongruous and leads to unreasonable and harsh results.

Congress has built a fence around the type of work that is required to be performed by the two classes of conscientious objectors after induction into service of the United States. One classified in I-A-O as a conscientious objector must go into the army, wear a uniform and perform all kinds of military service except combat duty. The other is required to do civilian work contributing to the national

health, safety and welfare. These are the only words of Congress on the type of work to be done by conscientious objectors. Congress did not go outside the boundaries of the law and legislate on the type of work done by the conscientious objector before he is inducted into service. It is therefore entirely irrelevant, immaterial and improper for the Government to amend the law by now doing what Congress has not done. It is for Congress to take the step the Government is taking. Since Congress has not taken the first step the Government cannot step in and take the leap Congress has not permitted it to take.

The position of the Government on the interpretation of the statute turns the hearing officers of the Department of Justice loose without control of law. It permits them to speculate, fly into the stratosphere of mind-reading and perform other extraordinary feats in the field of psychology involving cases of conscientious objectors that Congress never intended. This field, once opened up, will have no boundaries. There will be no limit to where the conscientious objector may be dragged by this type of administrative statutory interpretation.

The vague and indefinite dragnet character apparent in the argument of the Government under its misinterpretation of the word "conscientiously" has been answered fully in the reply brief for appellant in *Brown* v. *United States*, No. 14,101, on the docket of this Court, at pages 5-6. Reference is here made to the argument appearing at those pages as though copied at length herein. The entire speculative argument by the Government on pages 14-16 of its brief for appellee in this case has only one place to be made. That is on the floor of Congress or written to some committee in either house. It has no place in a consideration of the issues in this case in this Court, whose duty it is to fairly and fearlessly interpret the law as it has been written.

That a man can be a conscientious objector and still do work in a defense plant is amply demonstrated in

Girouard v. *United States,* 328 U. S. 61. In that case the Supreme Court said:

> "The bearing of arms, important as it is, is not the only way in which our institutions may be supported and defended, even in times of great peril. Total war in its modern form dramatizes as never before the great cooperative effort necessary for victory. The nuclear physicists who developed the atomic bomb, the worker at his lathe, the seaman on cargo vessels, construction battalions, nurses, engineers, litter bearers, doctors, chaplains—these, too, made essential contributions. And many of them made the supreme sacrifice. Mr. Justice Holmes stated in the *Schwimmer* case (279 U. S. p. 655) that 'the Quakers have done their share to make the country what it is.' And the annuals of the recent war show that many whose religious scruples prevented them from bearing arms, nevertheless were unselfish participants in war effort. Refusal to bear arms is not necessarily a sign of disloyalty or a lack of attachment to our institutions. One may serve his country faithfully and devotedly, though his religious scruples make it impossible for him to shoulder a rifle. Devotion to one's country can be as real and as enduring among non-combatants as among combatants. One may adhere to what he deems to be his obligation to God and yet assume all military risks to secure victory. The effort of war is indivisible; and those whose religious scruples prevent them from killing are no less patriots than those whose special traits or handicaps result in their assignment to duties far behind the fighting front. Each is making the utmost contribution according to his capacity. The fact that his role may be limited by religious convictions rather than by physical character-

istics has no necessary bearing on his attachment to his country or on his willingness to support and defend it to his utmost."

The argument of the Government in defiance of the intent of Congress by a strange and unreasonable interpretation of the term "conscientiously opposed" now would force all conscientious objectors to do absolutely nothing, either directly or indirectly, that might contribute to the war effort in order to preserve the freedom from participation in the armed forces granted to them by Congress.

That Franks may have been willing to work on war contracts does not in any way constitute basis in fact for the 1-A classification. That classification still remains arbitrary and capricious. There is nothing in the act or the regulations that authorizes the draft board to order a man to do noncombatant military service because he is willing to work on a war contract.

The act and the regulations are specific as to what constitutes a conscientious objector to both combatant and noncombatant military service. Nowhere in the act or in the regulations is there any basis for the assertion that performance of work on war contracts allows the draft board to classify a registrant as a noncombatant soldier. As long as a registrant can prove that he has conscientious objections to military service, both combatant and noncombatant, he is entitled to the full conscientious objector classification. This is true regardless of what sort of work he does. Whether he contributes directly or indirectly to the war effort is entirely immaterial.

If the position be upheld that one who performs work that contributes to the war effort is not entitled to the conscientious objector status, then it will become impossible for any conscientious objector ever to get the classification. Even a person who pays income tax or other tax to the federal government is contributing directly to the war effort. The money he pays in taxes is used for the financing of the military machine of this nation. Congress did not

intend to forfeit the conscientious objections on such a vague and indefinite basis. Congress defined what a conscientious objector is. As long as a person meets that definition and fits the statute and regulations, the fact that he might do work of any sort is wholly irrelevant and immaterial. The classification here, therefore, that Franks should be ordered to do noncombatant military service in the armed forces because he had worked on war contracts is arbitrary and capricious.

The Government, on page 15 of its brief, states that appellant said that he would be willing to work on and build battleships. He did not testify to this fact before the hearing officer. His testimony at the trial below was not contradicted by anything written by the hearing officer in his report. The hearing officer and the Department of Justice merely referred to his willingness to work in a defense plant. Neither said that he would be willing to build battleships. Franks said he would work in the naval shipyard only so long as such work did not directly pertain to warfare.—See the record. [38][1]

IV.

The old argument is made again by the Government that because Jehovah's Witnesses (of whom Franks is one) do not oppose the theocratic warfare described in the Bible there is no opposition to all wars. The erroneous lengthy jump is then taken by the Government that Franks is therefore not a conscientious objector.

This same argument was made by the Government in its brief in the case of *Brown* v. *United States,* No. 14,101, at pages 26-32. This was answered by the appellant in his reply brief in that case at page 22. The Court is referred to that argument made on those pages of that reply brief. The error of the Government's argument is more completely demonstrated in the brief for appellant in No.

[1] **Numbers appearing in brackets herein refer to pages of the printed Transcript of Record filed herein.**

14,105, *Shepherd* v. *United States* on the docket of this Court. Reference is here made to the argument under Point Three, at pages 35-43 of the brief for appellant in that case.—See also the reply brief for appellant in that case at pages 5-7.

It is significant that the Assistant Attorney General did not take the position in this case before the appeal board that the United States Attorney takes in his brief for appellee. The Department of Justice did not rely on the belief of appellant in theocratic warfare as a basis for the denial of the conscientious objector status. (Compare *Taffs* v. *United States,* 208 F. 2d 329 (8th Cir. Dec. 7, 1953).) It is being injected into the case for the first time here. This same inconsistent stand (made for the first time before the court of appeals) was rejected by the Second Circuit in *United States* v. *Hartman,* 209 F. 2d 366 (Jan. 8, 1954). It should be rejected here for the reasons given by Judge Medina in the *Hartman* opinion.

CONCLUSION

It is submitted, for the reasons above stated and for those expressed in the main brief, that the judgment of the court below should be reversed and the trial court ordered to grant the motion for judgment of acquittal.

Respectfully,

Hayden C. Covington
124 Columbia Heights
Brooklyn 1, New York

Counsel for Appellant

April, 1954.

No. 14115

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ROBERTS BROTHERS,

Respondent.

Transcript of Record

Petition for Enforcement of an Order of the National Labor Relations Board

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-24-53

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board,
Washington, D. C.,
For Petitioner, National Labor Relations Board.

ROSENBERG, SWIRE & COAN, by
ABE EUGENE ROSENBERG,
710 Pittock Block,
Portland, Oregon,
For Respondent, Roberts Brothers.

Form NLRB-501.

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 36-CA-347.

Date Filed: 12-8-52.

Compliance Status Checked by: M.K.

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9 (f), (g) and (h) of the National Labor Relations Act.

Instructions.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred, or is occurring.

1. Employer Against Whom Charge Is Brought:
   Name of Employer: Robert Bros., 3rd & Morrison, Portland, Oregon.
   Address of Establishment (Street and number, city, zone and State): 740 Willamette St., Eugene, Oregon.
   Nature of Employer's Business (State whether manufacturing, mining, construction, transportation, communication, other public utility, wholesale or retail trade, service, etc., and give

principal product or type of service rendered.): Retail department store.

The above-named employer has engaged in and is engaging in, unfair labor practices within the meaning of Section 8 (a), subsections (1) and (5) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates places, etc.):

   1. The company, by its officers and agents has refused to bargain collectively with the undersigned labor organization on and after December 3, 1952; the said labor organization having represented, and now representing, a majority of the employees in an appropriate bargaining unit composed of all employees of the Eugene store, excluding guards and supervisors, as defined in the Act.
   2. By refusing to bargain, by questioning employees as to their interest in the undersigned and by other acts, the said company, by its officers, agents and supervisors, has interfered with the rights of its employees as defined in Section 7 of the Act.

3. Full name of Labor Organization, including Local Name and Number, or Person Filing Charge:

   Local 201, Retail Clerks International Association, AFL.

4. Address (Street and number, city, zone, and State):

   Box 60, Eugene, Oregon. Telephone No. 42022.

5. Full Name of National or International Labor Organization of Which it is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization):

   Retail Clerks International Association, AFL.

6. Address of National or International, if any (Street and number, city, zone and State):

   Lafayette, Indiana.

7. Declaration:

   I declare that I have read the above charge and that the statements therein are true, to the best of my knowledge and belief.

   By /s/ GLIVA STEWARD,

   (Signature of Representative or Person Filing Charge)
   Secretary-Treasurer.

Date: 12/8/52.

Wilfully false statements on this charge can be punished by fine and imprisonment (U. S. Code, Title 18, Section 80.)

United States of America, Before the
National Labor Relations Board

Case No. 36-CA-347.

In the Matter of

ROBERTS BROTHERS

and

LOCAL 201, RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL.

COMPLAINT

It having been charged by Local 201, Retail Clerks International Association, AFL, that Roberts Brothers, herein called Respondent, has engaged in, and is now engaging in, certain unfair labor practices affecting commerce as set forth and defined in the Labor-Management Relations Act, as amended, 61 Stat. 136, hereinafter referred to as the Act, the General Counsel of the National Labor Relations Board, hereinafter referred to as the Board, by the Regional Director for the Nineteenth Region designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Roberts Brothers is an Oregon Corporation engaged in the business of selling general merchandise as a department store.

II.

In the course and conduct of its business, Respondent causes, and has caused, merchandise of value in excess of $25,000 yearly to be shipped to and through the states of the United States other than the State of Oregon. The Respondent operates stores in Portland, Salem, Corvallis and Eugene, Oregon, with its offices and principal place of business at Portland, Oregon.

III.

Local 201, Retail Clerks International Association, AFL, herein called the Union, is, and at all times herein mentioned, has been, a labor organization within the meaning of Section 2 (5) of the Act.

IV.

Since November 15, and particularly on December 6, 1952, the Respondent, by its officers, agents and supervisors, restrained and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act by, inter alia, polling all its employees on the question of whether the employees desired to be represented by the Union for purposes of collective bargaining.

V.

By the acts described in Paragraph IV, and by each of them, and for the reasons therein set forth, Respondent interfered with, restrained, and coerced its employees in the exercise of their rights guaranteed in Section 7 of the Act, and by all of said acts, and each of them, Respondent has engaged in,

and is now engaging in, unfair labor practies within the meaning of Section 8 (a) (1) of the Act.

VI.

The activities of Respondent as set forth in Paragraphs IV and V, occurring in connection with the operations of Respondent, as described in Paragraghs I and II, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States, and have led and tend to lead to, labor disputes burdening and obstructing commerce and the free flow of commerce.

VII.

The aforesaid acts of Respondent constitute unfair labor practices, affecting commerce within the meaning of Section 8 (a) (1) and Section 2 (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 26 day of February, 1953, issues this Complaint against Roberts Brothers, the Respondent herein.

[Seal] /s/ THOMAS P. GRAHAM, JR.
Regional Director, National Labor Relations Board,
19th Region.

United States of America, Before the
National Labor Relations Board

Case No. 36-CA-347

[Title of Cause.]

STIPULATION OF THE RECORD

It is hereby stipulated and agreed by and between Roberts Brothers, hereinafter called Respondents, acting by and through Abe Eugene Rosenberg, its representative, and Retail Clerks International Association, AFL, Local 201, hereinafter called the Union, acting by and through Paul Hansen, its representative, and the General Counsel of the National Labor Relations Board, acting by and through Paul E. Weil, its attorney, as follows:

I.

Upon charges filed by the Union on the 8th day of December, 1952, and served on the Respondents on the 8th day of December, 1952, receipt of which is hereby acknowledged by said Respondents, the General Counsel of the Board, on behalf of the Board, by the Regional Director for the Nineteenth Region of the Board, acting pursuant to authority granted by Section 10 (b) of the National Labor Relations Act, as amended, herein called the Act, and pursuant to the Board's Rules and Regulations, Series 6, Section 102.15, duly issued a Complaint and Notice of Hearing, on February 26, 1953, against the Respondents herein, receipt of which is hereby acknowledged.

II.

This Stipulation, together with the Charge, Complaint, Notice of Hearing, and Affidavit of Service, and other proofs of service of the said Charge, Complaint and Notice of Hearing, shall constitute the entire record herein and shall be filed with the Board.

III.

None of the parties shall in any way, be prejudiced by the failure to file an answer.

IV.

Respondent is a corporation organized and existing under and by virtue of the laws of the State of Oregon, having its principal office and place of business in the City of Portland, Oregon, and operating department stores in Portland, Salem, Corvallis and Eugene, Oregon.

V.

Respondent has, in the twelve-month period preceding the issuance of Complaint, in the course and conduct of its business, caused merchandise of value in excess of $25,000, to be shipped to and through the states of the United States, other than the State of Oregon, and in interstate commerce.

VI.

Respondent is, and at all times mentioned herein has been, an employer within the meaning of Section 2 (2) of the Act.

VII.

The Union is, and at all times mentioned herein,

has been, a labor organization within the meaning of Section 2 (5) of the Act.

VIII.

On or about December 3, 1952, by letter bearing that date, appended hereto and marked Appendix A, the Union represented to the Employer that the Union represented a majority of the employees in the Eugene store.

IX.

On or about December 6, 1952, a meeting was held of all store employees before the usual starting time for the sales personnel, and during working time for the few non-selling employees. The store manager addressed the employees, reading a prepared script, a copy of which is attached hereto and marked Appendix B.

X.

On or about December 6, 1952, at the conclusion of the speech referred to, in Paragraph IX, a secret poll by ballot of the employees was held in the following manner: One of the employees passed out slips which contained only the two words "for" and "against." The employees did not sign their names. The ballots were placed in a box. The store manager counted the ballots after the employees had been excused to return to work. Later in the day, the store manager posted a bulletin in the cafeteria announcing that 16 employees had voted "for," 39 had voted "against," and one ballot was "cast but not counted."

XI.

At the time of the balloting, there were approximately 44 regular and regular part-time non-supervisory employees of the Respondent, working in the store. At the same time, there were approximately 23 temporary employees employeed by the Respondent in the Eugene store. It is not ascertainable to what extent temporary employees voted in the balloting except that there were twelve more votes cast than there were regular and regular part-time non-supervisory employees employed by the Respondent at that time.

XII.

All parties hereto expressly waive their right to the filing of an answer, a hearing before a Trial Examiner, Intermediate Report of a Trial Examiner, and agree that this Stipulation shall be the sole and only evidence received or considered by the Board. Within twenty days or within such further period as the Board may allow from the date of the execution of this Stipulation, any party may file with the Board in Washington, D.C., an original and six (6) copies of a Motion to Dismiss the Complaint or, in the alternative, Proposed Findings of Fact and Conclusions of Law, or for the entry of the Board of any Order appropriate to Findings of Fact or Conclusions of Law made by it, together with an original and six (6) copies of a Brief in support of said Motions or Proposed Findings of Fact or Conclusions of Law, and immediately upon such filing, shall serve a copy on each of the other parties. Upon special leave of the Board, any party may

file a Reply Brief upon such terms as the Board may impose. Should any party desire to argue orally before the Board, the request shall be governed by Section 102.46 (c) of the Rules of the Board. The provisions of Section 10 (e) and 10 (f) of the Act are not waived by this Stipulation.

XIII.

It is further stipulated and agreed that this Stipulation embodies the entire agreement between the parties and that there is no oral agreement of any kind which varies, alters, or changes it in any respect. If, for any reason, this Stipulation should not be signed by all the parties hereto or should fail to be fully effective, according to its terms, this Stipulation shall be null and void for all purposes, and shall not be offered or received in evidence in any proceeding.

In Witness Whereof, the parties hereto have caused this Stipulation of the Record to be executed by their duly authorized representatives this 9th day of March, 1953.

ROBERTS BROTHERS,

By /s/ ABE EUGENE ROSENBERG.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL, LOCAL 201,

By /s/ PAUL W. HANSEN.

/s/ PAUL E. WEIL,

Counsel for the General Counsel, National Labor Relations Board, Region 19.

APPENDIX A

(Copy)

Retail Clerks' Union, Local 201
P. O. Box 60
Eugene, Oregon

December 3, 1952.

Dear Member: This is a copy of the official notification sent to your employer.

Mr. Block,
c/o Roberts Brothers,
740 Willamette St.,
Eugene, Oregon.

Dear Mr. Block:

You are hereby notified that Retail Clerks' Union, Local 201, represents a majority of the employees in your Eugene store.

Pending further negotiations, it is requested that you make no changes in the status of employees under the jurisdiction of the Union, nor should you intimidate or coerce directly, or indirectly, any of these persons, whether by calling meetings without due notice to the Union, or by approaching employees individually.

This formal notification is made because of this Union's experience in dealing with you, with regard to your store in Salem, last year.

You may wish to consult with your attorneys as

to your rights in dealing directly with your employees now that you have received this notification.

Very truly yours,

RETAIL CLERKS UNION,
LOCAL 201,

/s/ GLIVA STEWARD,
Secretary-Treasurer.

cc: Mr. Harry Roberts.

Paul Hansen, Regional Director,
Retail Clerks International.

APPENDIX B
(Copy)

Apparently the present activities of the retail clerks professional organizers has once again spread confusion and misunderstanding among our organization. There are certain basic rights and facts that are guaranteed to you by law, the primary one being you are free to make your own decision as to whether or not a union is a desirable affiliation, without interference from the Clerks' International organization or from this firm or its representatives. There has been reported that certain alleged statements have been made by these paid organizers.

1. That it would be difficult to continue your employment if you did not join the Union now. This is untrue. Regardless of whether or not you join any union, this firm will not, nor could not discriminate

against any employee on this basis. The only standards that will apply now or in the future, is the individual's loyalty, ability and past service. It is beyond any person, any organization or firm to guarantee continuing employment to any or all persons. The individual's choice as to his possible union position will have no more bearing on his employment than his or her church or lodge affiliation.

2. Various and sundry percentages have been alleged as having already signed the Union membership, intimating that if you haven't joined, you won't be with the crowd. This count has not been verified, so do not be stampeded on this point.

There have been other questions of too minor a nature to be dealt with here in detail. If you wish any further information either as a group or individually, I shall be glad to supply this to the best of my ability.

The main thing you should consider, is this question: What will I gain if I join the Union, versus what will I necessarily have to sacrifice in return?

Do you want to replace our now pleasant person to person relationship where adjustments are made as needed, and personal requirements dictate for a strict contractural relationship where these things are spelled out and administered by an outsider who has been selected for you by the International Clerks' back East, whose success is necessarily measured by this organization in how many dues payers he can provide for them?

Have you considered the almost impossible task

of once you have made such a commitment of trying to change your minde and status?

Have you given enough thought to the fact that you might some day wish to change positions and you will have been employed in the only union complete department store in Eugene, and what the mental reaction might possibly be of some of the less progressive merchants?

That the present dues paid by our Portland sales people amount to more than $40 per year, plus fines and assessments. Do you know that these dues were only 50c a month when they were first organized?

That the Portland people get no percentages on any sales except in furniture, appliances and shoes?

That the Portland sales people get no Christmas bonus, which amounts to as much as an extra two weeks' vacation pay, making it the same as if you were to receive four weeks paid vacation per year?

That the Portland sales people do not have a liberal one-day-a-month paid sick day when needed?

Have you considered coldly and objectively, those persons within your own organization who advocate this move? Are these people that you can respect and trust? Are these the people you want for your personal friends? Or are they constant misfits and malcontents? Are they, in most cases, those who have shown little or no appreciation for the many concessions they have received by this management?

I think, at this time, I should tell you something about Roberts Bros., as an organization. Roberts Bros. was founded about 70 years ago by two

brothers, namely Henry and Thomas Roberts in the City of Portland. They, of course, have passed away and the management is still controlled and wholly owned, by the second and third generations of the Roberts. Mr. E. H. Roberts is presently the head of our company, with Bill Roberts the general manager, with him is his brother, Dick, who is the buyer in our coat dept., in Portland, and also looks after the valley stores which are located in Salem, Corvallis and, of course, here in Eugene. They wholly own Roberts Bros., and are vitally interested in each unit, and also, in the employees of those stores. I, personally have been working for Roberts Bros. for over twenty years and have enjoyed the relationship to the utmost. I have never found them to be unfair to anyone or to any organization. In Portland, they are well known to all, for their ability as good storekeepers and for their liberal ideas and fairness to all. I wish you could talk to some of the people who have been with our organization of many years, some of them have been there 50 years, and get their feeling of loyalty. I am sure you understand how I feel about them, because I think they are the finest firm in the world to work for.

I am pointing out just a few of the things you should consider. Just remember, that no one may threaten, coerce, or promise reward, that this firm will treat with any union, if you so desire without reference to the individual, and we will just as

diligently protect non-union or union members from discrimination or abuse.

The decision must be your own. You are the ones that in any event, must bear the effects. Your wages, hours and conditions, I feel sure, are equal or better to any prevailing in the Eugene area. This has always been the firm's objective for a very selfish reason, that the best people are the most economical. And yet, it should be pointed out, that in any industry, the wages of any store cannot be appreciably beyond the competitive scale paid by its neighbors. So, it follows, that scales paid in Portland are not the same as Eugene, in all cases, nor are those paid in Detroit the same as Portland, and so on, from city to city.

To summarize, Roberts Bros. did not supply the union contract representatives with the names and addresses of you people.

We have maintained an impartial stand and did not authorize any representative of any activity, to disturb your privacy at home, nor to solicit your attentions during store hours.

You, who have been here any length of time, are well aware of the close relationship in existence between you and the management of the Eugene store. Your individual problems and concerns relative to your position have always been handled on a fair and dignified level with certain partialities, in many cases, to your own advantage, and in your own interests. Under the union arrangement, this close contact between you and the management is greatly

diminished. Your problems are reported to a representative of the Union who may be appointed from any area of the country, and he presents your problem to the management on strictly an impersonal basis and the management acts upon the situation in an impersonal and cut-and-dried fashion. If each of you will recall something in your past relationship with the management, that was of a personal nature, and most of you can, it was always met with understanding and comprehension to the point where your problem, personal as it was, became a concern of your management and every effort to assist you and console you during your remorse was exercised. Is this relationship, which is human and understanding, to be replaced with the impersonal dealings of a third party? That is your decision to make.

Under the union arrangement, the security of your job is not assured any more than it is at present. Merely by being a member of a union does not assure your job security. The management exercised its rights for satisfactory performance under union contract, as it does now, only the personal element and the individual situation does not enter so completely under the union contract. It becomes very impersonal as far as this analysis is concerned. Our record in this store speaks for itself. You have but to look and see how few actual releases have been made during the years. Is this not an example of maximum security?

We are interested in determining the desires of

all of you. I shall pass out a slip of paper on which are two typed words, Against and For. If you desire the union, vote "For." If you are against, place an X alongside the word "Against." This is a survey to determine your feelings and obviously, it will be a secret ballot for our information. I thank you for your kind indulgence during this matter.

[Stamped]: Informal.

United States of America, Before the
National Labor Relations Board

Case. No. 36-CA-347

In the Matter of

ROBERTS BROTHERS,

and

RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL, LOCAL 201.

DECISION AND ORDER

Upon the charge duly filed on December 8, 1952, by Retail Clerks International Association, AFL, Local 201, herein called the Union, the General Counsel of the National Labor Relations Board, herein called the General Counsel, by the Regional Director for the Nineteenth Region, issued a complaint, dated February 26, 1953, against Roberts

Brothers, herein called the Respondent, alleging that the Respondent interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of their rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in an unfair labor practice within the meaning of Section 8 (a) (1) of the Act. Copies of the complaint, the charge, and notices of hearing were duly served upon the Respondent and the Union, on or about, February 26, 1953.

With respect to the unfair labor practice, the complaint alleges, in substance, that, on or about December 6, 1952, the Respondent conducted a poll among its employees on the question of whether the employees desired to be represented by the Union for the purposes of collective bargaining, in violation of Section 8 (a) (1) of the Act.

Thereafter, all parties entered into a stipulation which set forth an agreed statement of facts. The stipulation provides that the parties, thereby, waived their rights to a hearing and to the taking of testimony before a Trial Examiner of the National Labor Relations Board. The stipulation further provides, that, upon such stipulation and the record as therein provided, the Board may make findings of fact, conclusions of law, and may issue the Decision and Order as if the same facts had been adduced in open hearing before a duly authorized Trial Examiner of the Board.

The aforesaid stipulation is hereby approved and accepted and made part of the record in this case.

In accordance with Section 102.45, of the National Labor Relations Board Rules and Regulations, this proceeding was duly transferred to, and continued before, the Board.

Upon the basis of the aforesaid stipulation, and the entire record in this case, the Board, having duly considered the brief filed by the Respondent, makes the following:

Findings of Fact

I.

The Business of the Respondent:

Respondent is an Oregon corporation, having its principal office and place of business in the City of Portland, Oregon, and operating department stores in Portland, Salem, Corvallis and Eugene, Oregon. The Respondent in the twelve month period preceding the issuance of the Complaint, in the course and conduct of its business, has caused merchandise valued in excess of $25,000, to be shipped to and through States of the United States other than the State of Oregon.

We find that the Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II.

The Organization Involved.

Retail Clerks International Association, AFL, Local 201, is a labor organization within the meaning of Section 2 (5) of the Act.

III.

Unfair Labor Practice.

The issue and surrounding relevant facts.

The sole issue in this case, on the facts stipulated by the parties, is whether the Respondent violated Section 8 (a) (1) of the Act, by conducting a secret poll to ascertain its employees' desires as to representation by the Union which claims to represent a majority of such employees.

By letter, dated December 3, 1952, the Union informed the Respondent that it represented a majority of the employees employed at the Employer's store in Eugene, Oregon.

On, or about, December 6, 1952, the Respondent's store manager called a meeting of all store employees, during the course of which, he addressed the employees from a prepared script concerning the Respondent's feelings toward union organization and membership. The statements contained in this address did not exceed the "free speech" provision of Section 8 (c) of the Act, and are not alleged specifically in the complaint, to constitute an unfair labor practice. The statements, however, clearly indicated the Respondent's desire not to have the Union represent the employees. Before concluding his speech, the store manager made the following remarks:

> "We are interested in determining the desires of all of you. I shall pass out a slip of paper, on which are typed two words, 'Against' and 'For.' If you desire the Union, vote 'for.' If

> you are against, place an 'X' alongside the word, 'against.' This is a survey to determine your feelings and obviously it will be a secret ballot for our information. I thank you for your kind indulgence during this matter."

Accordingly, one of the employees passed out among the employees present at the meeting, slips of paper, which contained the words "For" and "Against." Each employee indicated his desire on his slip of paper without signing his name, and placed the slip into a box. The store manager counted the ballots after the employees had returned to work. Later in the day, he posted a bulletin in the store cafeteria, announcing that 16 employees had voted "For," 30 had voted "Against," and 1 ballot was "cast but not counted."

At the time of the balloting, there were approximately 44 regular and regular part-time non-supervisory employees of the Respondent working in the store. At the same time, there were approximately 23 temporary employees employed by the Respondent in the Eugene store. It is not ascertainable, to what extent, temporary employees voted in the balloting, except, that there were twelve more votes cast than there were regular and regular part-time non-supervisory employees, employed by the Respondent at that time.

Conclusions with respect to the employee poll.

The Respondent contends that Section 8 (a) (1) of the Act, was not violated, because the poll was conducted in an atmosphere free from other em-

ployer unfair labor practices. We find no merit in this contention. For the reasons stated in Protein Blenders, Inc., 105 NLRB, No. 137, we find that the Respondent, by conducting a private poll of its employees to determine their union sentiment, under the circumstances set forth above, violated Section 8 (a) (1) of the Act, thereby, interfering with, restraining and coercing its employees in the exercise of their rights, guaranteed by Section 7 of the Act.

IV.

The effect of the unfair labor practice upon commerce.

The activities of the Repsondent set forth in Section III, above, occurring in connection with its operations described in Section 1, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States, and tend to lead to labor disputes, burdening and obstructing commerce in the free flow of commerce.

V.

The Remedy.

Having found that the Respondent has interfered with, restrained and coerced its employees by polling them as to their union desires, in violation of Section 8 (a) (1) of the Act, we shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the above findings of fact and

upon the entire record in the case, the Board makes the following:

Conclusions of Law

I.

Retail Clerks' International Association, AFL, Local 201, is a labor organization within the meaning of Section 2 (5) of the Act.

II.

By polling its employees as to their union sentiment, the Respondent has interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, and has violated Section 8 (a) (1) of the Act.

III.

The aforesaid unfair practice is an unfair labor practice affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Order

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Roberts Brothers, and its officers, agents, successors and assigns shall:

I.

Cease and desist from conducting polls among its employees to determine their union sentiment or in any other like or related manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, form labor or-

ganizations, to join or assist Retail Clerks International Association, AFL, Local 201, or any other labor organization; to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection, or to refrain from any or all such activities, except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8 (a) (3) of the Act.

II.

Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Post at its store in Eugene, Oregon, copies of the notice attached hereto and marked "Appendix."[1] Copies of such notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by the Respondent's authorized representative, be posted by the Respondent immediately upon receipt, thereof, in conspicuous places, including all places where notices to employees are customarily posted, and maintained by it for a period of sixty (60) consecutive days, thereafter. Reasonable steps shall be taken by the Re-

[1]In the event that this Order is enforced by a Decree of the United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order," the words, "Pursuant to Decree of the United States Court of Appeals, Enforcing an Order."

spondent, to assure that said notices are not altered, defaced or covered by any other material:

(b) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Signed at Washington, D. C., July 24, 1953.

JOHN M. HOUSTON,
Member;

ABE MURDOCK,
Member;

PAUL L. STYLES,
Member;

IVAR H. PETERSON,
Member.

[Seal] NATIONAL LABOR RELATIONS BOARD.

D-7535

APPENDIX

Notice to all Employees of Roberts Brothers Pursuant to a Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that:

We Will Not poll our employees concerning their desires or wishes, relative to the Retail Clerks International Association, AFL, Local 201, or any other labor organization, or in any like or related manner,

interfere with, restrain or coerce, our employees in the exercise of their rights of self-organization, to form labor organizations or to join or assist the above-named union, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all, such activities, except to the extent, that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

All of our employees are free to become or remain, or refrain from becoming or remaining, members of the above-named union or any other labor organization, except to the extent, that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the Act.

Dated .....

ROBERTS BROTHERS,
(Employer.)

By .....,
(Representative.) (Title.)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

ROBERTS BROTHERS,

Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its executive secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceeding had before said Board, entitled, "In the Matter of Roberts Brothers and Retail Clerks International Association, AFL, Local 201," the same being known as Case No. 36-CA-347 before said Board, such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Charge filed by Local 201, Retail Clerks International Association, AFL, on December 8, 1952,

together with affidavit of service and United States Post Office return receipt thereof.

(2) Complaint and Notice of Hearing issued by the Regional Director on February 26, 1953, together with affidavit of service and United States Post Office return receipts thereof.

(3) Stipulation of the Record dated March 9, 1953, (and attachments thereto), setting forth an agreed statement of facts; providing that the parties thereby waived their rights to a hearing and to the taking of testimony before a Trial Examiner of the National Labor Relations Board; and providing that the Board make findings of fact, conclusions of law, and issue its Decision and Order.

(4) Copy of Board's Decision and Order approving stipulation of record and transferring case to the Board, findings of fact and order issued by the National Labor Relations Board on July 24, 1953, together with affidavit of service and United States Post Office return receipts thereof.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 20th day of November, 1953.

[Seal] FRANK M. KLEILER,
Executive Secretary.

NATIONAL LABOR
RELATIONS BOARD.

[Endorsed]: No. 14115. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. Roberts Brothers, Respondent. Transcript of Record. Petition for Enforcement of an Order of the National Labor Relations Board.

Filed November 24, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States of America, Before the
National Labor Relations Board

Case No. 36-CA-347

In the Matter of:

ROBERTS BROTHERS

and

RETAIL CLERKS INTERNATIONAL ASSOCIATION, A.F.L., LOCAL 201.

MOTION TO DISMISS BOARD'S COMPLAINT

Comes now the Respondent and moves the Board for an Order dismissing the Board's Complaint on the grounds and for the reasons:

First: That the sole act alleged to have been committed by Respondent, to wit: "* * * polling all its employees on the question of whether the employees desired to be represented by the Union for purposes of collective bargaining" does not constitute an unfair labor practice within the meaning of Sections 8 (a) (1) and 7 of the Act.

Second: That based upon the Stipulation of Record herein, the employer-conducted secret poll by ballot was not in violation of Sections 8 (a) (1) and 7 of the Act and under Section 10 (c) of the Act, the Board should issue an order dismissing the said Complaint.

ABE EUGENE ROSENBERG,
Of Counsel for Respondent,
Roberts Bros.

In the United States Court of Appeals
for the Ninth Circuit

No. 14115

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROBERTS BROTHERS,
Respondent.

PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, Secs. 141, et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its Order against Respondent, Roberts Brothers, and its officers, agents, successors and assigns. The proceeding resulting in said Order is known upon the records of the Board as "In the Matter of Roberts Brothers and Retail Clerks International Association AFL, Local 201, Case No. 36-CA-347."

In support of this petition the Board respectfully shows:

(1) Respondent is an Oregon corporation engaged in business in the State of Oregon, within this judicial circuit where the unfair labor practices oc-

curred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) Upon due proceedings had before the Board in said matter, the Board on July 24, 1953, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, and its officers, agents, successors and assigns. On the same date, the Board's Decision and Order was served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(3) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court a transcript of the entire record of the proceeding before the Board upon which the said Order was entered, which transcript includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring

Respondent, and its officers, agents, successors and assigns, to comply therewith.

NATIONAL LABOR
RELATIONS BOARD,

By /s/ A. NORMAN SOMERS,
Assistant General Counsel.

Dated at Washington, D. C., this 30th day of October, 1953.

[Endorsed]: Filed November 3, 1953.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

Respondent, Roberts Brothers, for its answer to the petition of the National Labor Relations Board, admits, denies and alleges as follows:

1. Respondent admits Paragraph I, except that it denies that it committed an unfair labor practice and Respondent further denies that this Court has jurisdiction until the transcript of the entire record is filed with it.

2. Respondent admits Paragraph II.

3. Respondent admits Paragraph III, but denies

this Court's jurisdiction until such time as said transcript is filed.

4. Respondent alleges that the Order sought to be enforced by this proceeding is not entitled to enforcement upon the following grounds:

(a) The sole act alleged to have been committed by Respondent, to wit: "* * * polling all its employees on the question of whether the employees desire to be represented by the Union for purposes of collective bargaining" does not constitute an unfair labor practice within the meaning of Sections 8 (a) (1) and 7 of the Act.

(b) Based upon the Stipulation of record herein the employer-conducted secret poll by ballot was not in violation of Sections 8 (a) (1) and 7 of the Act.

(c) Respondent's motion before the Board to dismiss the complaint on the aforementioned grounds should have been granted.

(d) The Board's findings and the Board's Conclusions of Law II and III that by polling its employees as to their Union sentiment the Respondent has interfered with, restrained and coerced its employees and that said conduct constitutes an unfair labor practice are erroneous and should be reversed.

Wherefore, Respondent prays this Honorable Court that it cause a copy of this answer to be served upon Petitioner, and that upon the pleadings, stipulation of record before the Board and the proceedings set forth in the transcript and upon the

Order made thereon, it make and enter a Decree denying enforcement in whole of said Order of the Board, and setting same aside as contrary to law.

Respectfully submitted,

ROBERTS BROTHERS,
By /s/ ABE EUGENE ROSENBERG,
Attorney for Respondent.

Dated at Portland, Oregon, this 17th day of November, 1953.

[Endorsed]: Filed November 19, 1953.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED ON

In this proceeding, the petitioner, National Labor Relations Board, will urge and rely upon the following point:

The Board properly found that respondent Company violated Section 8 (a) (1) of the Act by conducting at the conclusion of a privileged anti-Union speech a secret poll among its employees to ascertain their desires as to representation by the Union.

/s/ A. NORMAN SOMERS,
Assistant General Counsel, National Labor Relations Board.

Dated at Washington, D. C., this 20th day of November, 1953.

[Endorsed]: Filed November 24, 1953.

No. 14115

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ROBERTS BROTHERS, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
NORTON J. COME,
PETER BAUER,
Attorneys,
National Labor Relations Board.

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AUTHORITIES CITED

Cases:

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ROBERTS BROTHERS, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, Secs. 151, *et seq.*), for the enforcement of its order issued against Roberts Brothers, respondent herein, on July 24, 1953, following proceedings under Section 10 of the Act. The Board's decision and order (R. 21–29) [1] are reported in 106 N. L. R. B. No. 74. This Court has jurisdiction of the proceeding under Section 10

[1] References to portions of the printed record are designated "R." Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

(e) of the Act, the unfair labor practice having occurred at Eugene, Oregon, within this judicial circuit.[2]

STATEMENT OF THE CASE

I. The Board's findings of fact

Upon charges filed by the Retail Clerk's International Association, A. F. of L., Local 201, hereafter called the Union, the Board found that respondent violated Section 8 (a) (1) of the Act by conducting, at the conclusion of a privileged anti-Union speech, a secret poll among its employees to ascertain whether they desired to be represented by the Union. The facts are undisputed and were stipulated by all the parties. They may be briefly summarized as follows:

On December 3, 1952, the Union sent respondent a letter informing it that the Union "represents a majority of the employees in your Eugene store." The Union also requested that it be notified prior to any meetings of employees called by the respondent (R. 24; 14). About December 6, respondent's store manager, without bothering to reply to the Union, called together all the employees and read to them a prepared speech which advanced reasons for rejecting the Union (R. 24; 11).

[2] Respondent, an Oregon Corporation having its principal office and place of business in Portland, Oregon, operates department stores in Portland, Salem, Corvallis, and Eugene, Oregon. In the twelve-month period preceding the issuance of the complaint herein, respondent caused merchandise valued in excess of $25,000 to be shipped to and through states other than the State of Oregon. The Board found, and the respondent does not deny, that respondent's business affects interstate commerce within the meaning of the Act (R. 23; 7).

Thus, the manager's speech pointed out that, although the employees were free to choose or reject the Union without interference from or discrimination by the respondent, their selection of the Union as a representative would jeopardize the existing "pleasant person to person relationship"; that it might diminish the employees' chances of securing positions with the "less progressive merchants" in town; that the experience of the "Portland people" with a union had led to high dues, restricted commissions, and a decrease in bonuses and other benefits; and that, with a union, the "human and understanding" handling of personnel problems by the respondent would give way to the "impersonal dealings of a third party" (R. 15–21). At the end of the speech, which the Board deemed privileged under Section 8 (c) of the Act (R. 24), the store manager declared (R. 24–25; 20–21):

> We are interested in determining the desires of all of you. I shall pass out a slip of paper on which are typed two words, "Against" and "For." If you desire the Union vote "For." If you are against, place an "X" along side the word "Against." This is a survey to determine your feelings and obviously it will be a secret ballot for our information. I thank you for your kind indulgence during this matter.

Thereupon, one of the employees passed out among the remainder present at the meeting slips of paper which contained the words "For" and "Against." Each employee indicated his preference on the slip

of paper given him without signing his name, and then placed the paper into a box. The store manager counted the ballots after the employees had returned to work. Later in the day, the manager posted a bulletin in the store cafeteria announcing that 16 employees had voted "For," 39 had voted "Against" and 1 ballot was "cast but not counted" (R. 25; 11–12).

At the time of the balloting, there were approximately 44 regular and regular, part-time nonsupervisory employees working in the store. In addition, the store employed approximately 23 temporary employees. It is not ascertainable to what extent temporary employees voted in the balloting, except that the number of votes cast exceeded the total complement of regular and regular, part-time nonsupervisory employees by twelve (R. 25; 12).

II. The Board's conclusion and order

The Board concluded that, in the above circumstances, the employer-conducted poll constituted conduct which violated Section 8 (a) (1) of the Act (R. 27). In support of this conclusion, the Board referred to its reasoning in *Protein Blenders, Inc.*,[3] a similar case decided one month earlier. There the Board pointed out that an employer-conducted poll, even in the absence of other unfair labor practices, tended to have a coercive effect on the employees, and to act as a deterrent to the free exercise of the employees' right to self-organization (pp. 20–23, *infra*).

[3] 105 N. L. R. B. No. 137 (June 30, 1953). The relevant portion of this decision is printed in Appendix B, *infra*, pp. 20–23.

Accordingly the Board entered an order (R. 27–30) which requires respondent to cease and desist from polling its employees to determine their union sentiment, or from, in any other like or related manner, interfering with, restraining, or coercing its employees in the enjoyment of the rights guaranteed by Section 7. The order also required respondent to post the usual notices.

ARGUMENT

The Board properly found that respondent violated Section 8 (a) (1) of the Act by conducting, at the conclusion of an anti-Union speech, a poll to determine whether its employees desired to be represented by the Union

A. Like "mass interrogation," the poll had a coercive tendency

As this Court has noted, employer "interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer had obtained." *N. L. R. B.* v. *West Coast Casket Co., Inc.*, 205 F. 2d 902, 904. Such fear and its consequent restraint of union activity is necessarily heightened where the questioning is of a wholesale nature and occurs right after the employer has indicated that he opposes the union. For, while there may be situations where an employee might be expected to pass off an isolated instance of employer interrogation,[4] the impact of the question cannot help but register when the employer has made plain his interest in defeating the union and has gone to the pains of canvassing his entire working force on this issue. See *N. L. R. B.* v.

[4] Cf. *Wayside Press* v. *N. L. R. B.*, 206 F. 2d 862, 864 (C. A. 9).

Syracuse Color Press, Inc., C. A. 2, decided January 5, 1954, 33 L. R. R. M. 2334.

These principles are applicable to the poll here. It amounted to the systematic questioning of virtually all of the store employees—right after respondent's opposition to the Union had been indicated—concerning their preference therefor. Had the inquiry been oral, the aforementioned principles leave little doubt that this type of questioning, at least on such a broad scale, could be expected [5] to engender fear in some employees that, if they disclosed a Union preference, reprisals would likely follow. We submit that the coercive tendency of such mass interrogation is not substantially altered where it occurs through a written poll conducted by a party interested in obtaining a particular result, especially under the conditions which prevailed in this case.

Although the technique used here professedly masks the identity of individual union adherents, experience has shown that employees are likely to fear that ballots may contain hidden identification marks (see *Okey Hosiery Co., Inc.*, 22 N. L. R. B. 792, 798), or that the employer may in some other manner determine how they vote, as by fixing the ballot box so that the ballots lie in the order in which they are

[5] It is well settled that the test of a violation of Section 8 (a) (1) of the Act "is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to interfere with the free exercise of employee rights under the Act." *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732, 743–744 (C. A. D. C.), certiorari denied, 341 U. S. 914. See also, *N. L. R. B.* v. *Link-Belt Co.*, 311 U. S. 584, 588; *Elastic Stop Nut Co.* v. *N. L. R. B.*, 142 F. 2d 371, 377 (C. A. 8), certiorari denied, 323 U. S. 722.

placed in the box. The method of conducting the instant poll reveals, moreover, that it was reasonable to expect that similar fears would beset respondent's employees. Thus, the voting group was relatively small; the employees marked their ballots in the open and while respondent's manager remained in the room; and the ballots were counted after the employees had returned to work (R. 11–12). In these circumstances, respondent's employees would be amply justified in concluding that, even though they did not have to write their name on the ballot, they could not be sure of anonymity.

But, assuming that the poll guaranteed nondisclosure of individual identities, it still conveyed, as the Board has properly recognized (p. 21, *infra*), the "fear of retaliation against the employees as a group, should they oppose the desires of the employer." That is, it is not unlikely that each employee—lacking the assurance of impartiality provided by the presence of neutral observers in Board-conducted elections—might fear that his vote could be the one which gives the Union a majority and thus bring on economic sanctions; hence, he would be induced to "play it safe" and vote as respondent desired.

Similarly, irrespective of whether it revealed individual identities, the poll also exerted coercion on the employees as a group by virtue of its proximity to respondent's anti-Union speech. Thus, even with respect to its own elections, the Board has concluded that such last-minute speeches on company premises impede freedom of choice. The Board has stated its

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rationale for this conclusion as follows (*Peerless Plywood Co.,* 107 N. L. R. B. No. 106, December 22, 1953, 33 L. R. R. M. 1151, 1152):

> It is our considered view, based on experience with conducting representation elections, that last-minute speeches by either employers or unions delivered to massed assemblies of employees on company time have an unwholesome and unsettling effect and tend to interfere with that sober and thoughful choice which a free election is designed to reflect. We believe that the real vice is in the last-minute character of the speech coupled with the fact that it is made on company time whether delivered by the employer or the union or both. Such a speech, because of its timing, tends to create a mass psychology which overrides arguments made through other campaign media and gives an unfair advantage to the party, whether employer or union, who in this manner obtains the last most telling word.

When, as here, a last-minute anti-Union speech is combined with the requirement that the employees immediately commit themselves in a poll exclusively controlled by the speaker—which lacks the Board conducted election's "advantage of impartial supervision and its guarantee of anonymity to employees in expressing their choice by secret ballot" (*N. L. R. B.* v. *Brooks,* 204 F. 2d 899, 903 (C. A. 9), pet. for cert. pending)—the employees' choice is not only impeded but, indeed, coerced. The step from interference "to restraint or intimidation is a short one." *N. L. R. B.* v. *Syracuse Color Press, Inc.,* No. 99

C. A. 2, decided January 5, 1954, 33 L. R. R. M. at 2336.

In sum, as the Second Circuit in *Syracuse Color Press* emphasized with reference to the analogous "mass" interrogation involved therein: "Here the time, the place, the personnel involved, the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion" (33 L. R. R. M. at 2336). On the basis of these same factors in the instant case, the Board properly concluded that respondent's poll involved elements of coercion which illegally qualified the full freedom of choice guaranteed to respondent's employees by Section 7 of the Act.[6]

B. The poll also amounted to employer resolution of the question concerning representation

In addition to the coercive impact just described, the employer-poll interferes with the union's organizational effort. Thus, as the Board has pointed out, such polls (p. 22, *infra*):

[6] This conclusion is supported by judicial precedent, which has often recognized and condemned the coercive effect of employer-conducted elections on the issue of union representation. See *N. L. R. B.* v. *Sunshine Mining Co.*, 110 F. 2d 780, 785–786 (C. A. 9), certiorari denied, 312 U. S. 678; *N. L. R. B.* v. *Tehel Bottling Co.*, 129 F. 2d 250, 252–253 (C. A. 8); *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 181–182 (C. A. 6); *N. L. R. B.* v. *Burry Biscuit Corp.*, 123 F. 2d 540, 541–543 (C. A. 7); *Titan Metal Mfg. Co.* v. *N. L. R. B.*, 106 F. 2d 254, 260 (C. A. 3), certiorari denied, 308 U. S. 615; *N. L. R. B.* v. *Sommerville Buick*, 194 F. 2d 56, 58 (C. A. 1).

> * * * force a union to a show of strength under conditions within the control of the employer, and at a stage of organization when employees have not had a full opportunity to persuade their fellow employees to their views concerning union activity * * *

Although an employer need not recognize a union until its majority has been proven, he substantially intrudes upon the right to self-organization guaranteed in Section 7 of the Act when he compels his employees to make a choice this abruptly. For it is firmly established that such guarantee comprehends both the right of employees "fully and freely to discuss and be informed" concerning unionization and the "correlative * * * right of the union * * * to discuss with and inform the employees concerning matters involved in their choice." *Thomas* v. *Collins,* 323 U. S. 516, 534.[7]

Moreover, the voting results unfavorable to the union yielded by the poll, in turn, enable the employer to frustrate the union campaign. As the Board has pointed out (p. 22, *infra*), such results "provide the employer with an apparent basis for refusing to recognize a union when the union in fact represents a majority of the employees." Similarly, a "union's failure to secure a majority vote in such a poll tends to cause union adherents to abandon their

[7] To allow ample time for that purpose, it is customary for the Board to provide a 30-day period between the issuance of its direction of election and the actual voting. This, of course, is in addition to the time which elapses between the filing of the petition and the direction.

support of the union and to discourage undecided employees from joining the union." (*Ibid.*)[8]

Accordingly, the employer-poll "in effect resolves the question of representation" (p. 22, *infra*). Despite the fact that an official Board election may still follow and the intervening period may afford the union time in which to attempt a neutralizing of the poll's impact, it is not likely that the initial result forced by the employer can be altered. Just as a union could not be expected in a short period to erase the imprint of an employer's threats or bribes to his employees, so is failure virtually inevitable for the union which must continue its organizing campaign under the shadow of the preliminary defeat sustained in the employer's poll.

In any event, subjecting a self-organizational effort to this hurdle would gratuitously afford the employer an edge that would upset the delicate balance which the Act attempts to draw between the rights guaranteed to employees and the interests of employers. Cf. *Republic Aviation Corp.* v. *N. L. R. B.,* 324 U. S. 793, 797–798. The Act, of course, permits the employer to attempt, by argument or opinion, to persuade the employees to withdraw their support from

[8] The inequity of these consequences is compounded here because, not only were the poll results subject to the element of coercion previously discussed, but they reflected the votes of at least 12, and possibly more, of respondent's temporary employees (R. 12), who might be outside the appropriate bargaining unit and/or be ineligible to vote in a Board conducted election. Furthermore, since the ballots were counted by respondent's manager after the employees had returned to work (R. 11), there is no assurance that even the tally announced was an accurate one.

the union (see p. 13, *infra*). Moreover, if he desires a poll of his employees on the question, the Act permits him, without obtaining the union's consent, to petition the Board for a representation election (Section 9 (c) (1) (B)); or if he is unwilling to wait for a Board election, he may work out with the union some other impartial, but informal, method of verifying the union's claim, such as a check of membership cards or a poll by a neutral body. We submit, however, that there is no justification for permitting the employer—particularly where, as here, there is no compelling business reason for his precipitate action—to require the union's claims to run the gauntlet of an initial coerced vote, taken under conditions exclusively determined and controlled by him.

Hence, not only did the instant poll have a coercive tendency upon the individual voters, but it undermined the Union, thwarted the employees' self-organization effort, and in effect amounted to employer resolution of the representation question.

C. Respondent's defenses are without merit

1. Respondent claimed before the Board that, since no other unfair labor practices were committed by it, the holding of the poll could not be an unfair labor practice. Although the commission of other unfair labor practices often colors related and equivocal activities of an employer, the unfair labor practice found herein stands on its own feet. As we have shown, by eliciting the views of its employees as to Union representation in the shadow of its anti-Union speech, respondent, without more, interfered with and coerced the employees in the exer-

cise of their "complete and unfettered freedom of choice" (*N. L. R. B.* v. *Link-Belt Co.,* 311 U. S. 584, 588). Consequently, since Section 8 (a) (1) of the Act prohibits *any* interference, restraint or coercion, a single act of this type is encompassed therein no less than a multitude thereof. See *N. L. R. B.* v. *Syracuse Color Press, Inc.,* No. 99, (C. A. 2), decided January 5, 1954, 33 L. R. R. M. 2334. See also *Berkshire Knitting Mills* v. *N. L. R. B.,* 139 F. 2d 134, 140 (C. A. 3), cert. den., 322 U. S. 747; *Anthony & Sons* v. *N. L. R. B.,* 163 F. 2d 22, 27 (C. A. D. C.), cert. den., 332 U. S. 773. Cf. *Magnolia Petroleum Co.* v. *N. L. R. B.,* 200 F. 2d 148, 150 (C. A. 5).

2. Similarly without merit is respondent's reliance on Section 8 (c) of the Act. Since it has been established that the poll was coercive, it falls outside of this provision which protects only "non-coercive speech." *I. B. E. W.* v. *N. L. R. B.,* 341 U. S. 694, 704. See also, *N. L. R. B.* v. *Syracuse Color Press, Inc., supra,* 33 L. R. R. M. at 2336. Nor does the poll gain any immunity by virtue of the fact the speech preceding it may be protected by Section 8 (c). "Employers still may not under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in the exercise of rights guaranteed them by the Act." *N. L. R. B.* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. A. 5). See also, *N. L. R. B.* v. *Kropp Forge Co.,* 178 F. 2d 822, 828 (C. A. 7), certiorari denied, 340 U. S. 810.

3. The cases principally relied on by respondent before the Board are inapposite. Thus, in *N. L. R. B.*

v. *Kingston,* 172 F. 2d 771 (C. A. 6), the employer, unlike respondent, not only had a valid economic reason for conducting the poll, but he "had expressed no opinion on the merits or demerits of unions, and attempted in no way to discharge or discourage such organization"; indeed, he "was found by the Board to have acted in good faith" (172 F. 2d at 773–774). Obviously, a poll conducted in this setting would be less likely to have a coercive tendency than the instant one, which, as we have shown, was not motivated by pressing business considerations and occurred on the wave of a speech making clear respondent's opposition to the union.[9]

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[9] Cf. *Howard W. Davis d/b/a The Walmac Company*, 106 N. L. R. B. No. 244, decided October 29, 1953, 33 L. R. R. M. 1019. There the Board itself recognized that, when the employer poll is not preceded by an expression of his anti-union sentiment, it may lose its coercive complexion and thus fall outside the ban of Section 8 (a) (1). In arriving at this conclusion in *Walmac*, the Board also emphasized that the poll was occasioned by a rather unusual sequence of events: the union first petitioned the Board for a representation election, and then, despite the employer's willingness for such election withdrew the petition; thereafter, in response to a suggestion from the Board's Regional Director that respondent might on its own be able to resolve its disagreement with the union, the poll was held. See *N. L. R. B.* v. *Eanet*, 179 F. 2d 15, 16, 18 (C. A. D. C.), wherein the Court declined to enforce a Board remedy against an employer poll where, *inter alia*, the employer had been misled into permitting it by the ambiguity of the Board agent's instructions.

That *Walmac* does not control the different factual setting presented here is shown by the circumstance that on January 22, 1954, the Board denied a motion for reconsideration in *Protein Blenders* (the basis for the instant decision). This motion had been predicated on the ground that the intervening decision in *Walmac* had overruled *Protein Blenders.*

In both *N. L. R. B.* v. *Algoma Plywood & Veneer,* 121 F. 2d 602 (C. A. 7), and *N. L. R. B.* v. *Penokee Veneer Co.,* 168 F. 2d 868 (C. A. 7), on the other hand, the employer had recognized the union as the bargaining representative and had been bargaining with it for the purpose of negotiating a collective bargaining contract. An impasse then ensued; whereupon the union either called or threatened to call a strike, and the employer countered by polling the employees directly on whether they favored the union or the company position. In this situation, the question is not whether the poll has a tendency to restrain the employee at the threshold of an organizing campaign, but the entirely different problem of whether, in the circumstances presented, the bypassing of an already recognized bargaining representative would unduly interfere with the employees' right to bargain through representatives. Accordingly, the holdings in these cases, likewise, cannot be controlling here.

CONCLUSION

For the above reasons, it is respectfully submitted that a decree should issue enforcing the Board's order.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
NORTON J. COME,
PETER BAUER,
Attorneys,
National Labor Relations Board.

FEBRUARY 1954.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

REPRESENTATIONS AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election

by secret ballot and shall certify the results thereof.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

* * * * *

(c) If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act; * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the

proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact is supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

APPENDIX B

The relevant portion of the Board's decision in *Protein Blenders,* 105 N. L. R. B. No. 136, is set forth below.

[After concluding that certain letters sent to respondent's employees and an anti-union speech preceding the employer-conducted poll were privileged under Section 8 (c) of the Act, the Board continued as follows:]

> The Board is of the opinion, however, that by polling its employees on April 4, 1952, as to whether or not they wanted the Union, the Respondent violated the Act. The Board has often found that employer-conducted polls on union questions constitute unfair labor practices or interference with an election. Upon reconsidering the question of employer polls in the light of the facts of this case and the arguments presented by the Respondent, the Board concludes that in most situations such polls—apart from any other unfair labor practices—are violative of Section 8 (a) (1) of the Act.
>
> The Board's position has consistently been that Section 8 (a) (1) of the Act is violated when an employer questions his employees concerning any aspect of union activities. In explicating its reasons for holding that interrogation of individual employees is unlawful, the Board in the recent case of *Syracuse Color Press, Inc.,* 103 N. L. R. B. No. 26, reaffirmed the view it expressed in the earlier case of *Standard-Coosa-Thatcher,* 85 N. L. R. B. 1358, that "inherent in the very nature of the rights protected by Section 7 is the concomitant right of privacy in their enjoyment—'full freedom' from employer intermeddling, intrusion, or

even knowledge." The Board further emphasized its conclusion that any attempt on the part of an employer to elicit information from employees concerning union activity, regardless of the employer's purpose in seeking such information, is reasonably calculated to arouse the fear that some form of reprisal will follow once the information is obtained.

An oral poll of employees is mass interrogation with the attendant threat of economic detriment to individuals opposing the employer's views concerning concerted activity. A poll by written ballot when conducted by a party interested in obtaining a particular result is susceptible to abuse in presenting the issue to be voted upon in a biased or confusing manner, in impairing the secrecy of the ballot, and in tampering with the results of voting. Even where secrecy of the ballot is in fact preserved and the results of the election are accurately tabulated—as the Respondent contends is the situation in this case—an employer poll may constitute an invasion of the rights guaranteed by Section 7 of the Act. Although the identity of individual union adherents may not be revealed by such a poll and employees may be so assured by the employer, they can never be certain that their vote is secret nor do they have the guarantee of anonymity which is afforded by an election conducted by the Board. The fear of retaliation against the employees as a group, should they oppose the desires of the employer, is also present. Thus even a poll by secret ballot when conducted under the auspices of a partisan employer involves elements of coercion. Declarations that no detriment will result to employees whatever their vote, as made by this Respondent, are ineffective to dispel employees' fears in these circumstances, particularly when the employer at the same time, as here, makes known his strong desire that employees vote against the union

and establishes opposition to the union as the test of loyalty to the employer.

In addition to the coercive effect they have upon the individual voters, employer polls are an effective means of undermining a union and interfering with self-organization of employees. By use of such polls an employer may force a union to a show of strength under conditions within the control of the employer, and at a stage of organization when employees have not had a full opportunity to persuade their fellow employees to their views concerning union activity. Such a premature test tends to frustrate self-organization. Voting results unfavorable to union organization may cause postponement of a request to bargain or the filing of a representation petition, as the Respondent recognized in its letter of April 9, or may provide the employer with an apparent basis for refusing to recognize a union when the union in fact represents a majority of the employees. A union's failure to secure a majority vote in such a poll tends to cause union adherents to abandon their support of the union and to discourage undecided employees from joining the union, not as the result of persuasion protected by Section 8 (c) but as the result of conduct reasonably calculated to produce fear.

Where a union has made a claim of majority representation, as in the instant case, an employer by conducting a poll as to whether its employees want to be represented by the union, in effect resolves the question of representation, a function which the Act assigns exclusively to the Board. Determination of a question of representation under conditions controlled by an employer, or, indeed, by a labor organization, rather than by an impartial agency interested solely in safeguarding the fairness of the election, does not guarantee a free expression of employee desires as to representation, nor does it provide for a proper determination of an

appropriate bargaining unit. Employer-conducted elections for the determination of a question concerning representation are an unwarranted private assumption of a function assigned to the Board under the Statute.

For the foregoing reasons we find that the Respondent, by conducting a private poll of its employees to determine their union sentiment, violated Section 8 (a) (1) of the Act, thereby interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act.

U. S. GOVERNMENT PRINTING OFFICE: 1954

No. 14115

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

ROBERTS BROTHERS,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

BRIEF FOR RESPONDENT, ROBERTS BROTHERS

ROSENBERG, SWIRE & COAN,

ABE EUGENE ROSENBERG,
PHILIP A. LEVIN,

Of Counsel,
Respondent, Roberts Bros.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-54

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BRIEF FOR RESPONDENT, ROBERTS BROTHERS

STATEMENT OF THE CASE

This is a petition by the National Labor Relations Board for enforcement of an order against Respondent. The jursdiction of the Court is conceded. The facts are stipulated.

In brief, the employer, after the union had claimed that it represented a majority, made a speech to the employees opposing the union. The speech contained neither promise of benefit nor threat of reprisal. Then

Respondent took a secret poll of the employees for its information in determining whether the union in fact represented a majority.

The Board concluded that the above-stated facts constituted coercion and violated Section 8 (a) (1) of the National Labor Relations Act, as amended. Respondent contends that there is no substantial evidence to sustain the Board's finding and order.

ARGUMENT

In the absence of other unfair labor practices which give a coercive color to a secret poll of employees, there is no basis for assuming that the likely effect of the poll was coercive without any evidence, and a speech which the Act expressly permits the employer to make cannot of itself convert a non-coercive act into an unfair labor practice.

PETITIONER'S POINT A

The argument of the N.L.R.B. under this point is broken down into sub-sections. The first of these asserts that interrogation as to Union sympathy violates the Act because the employees may fear discrimination based on the information thereby obtained (Pet. Br., p. 5). The irrelevance of this contention to the record in this case, which stipulates that the poll was "secret", is so manifest as to require no discussion. Suffice it to say that an employer can not very well discriminate

against pro-union employees because of a poll which does not reveal who they are.

The Board then argues that even though the poll may in fact be secret, employees may fear that the employer has used some illegitimate means of determining how individuals voted (Pet. Br., p. 6). No justification for this assumption exists in the record. The question before the Court is not whether some hypothetical employee might have been coerced, but whether or not these employees, under the stipulated facts, have in fact been coerced or restrained. If the union or the Board had any evidence that Respondent did use some undisclosed method to determine how individuals voted, or even that any employee was afraid that it had done so, they were at liberty to present such evidence. Instead, it was expressly stipulated by the parties that the poll was secret (Stip., Paragraph X, R., p. 11),* and the only point relied upon by petitioner is that a "secret poll" violated the Act (R., p. 39). Had the secrecy of the poll been at issue before the Board, the Respondent could have presented testimony that its secrecy was scrupulously respected and that the employees were not afraid that their votes might be revealed. There was no need for such testimony because it was admitted and stipulated throughout that the vote was secret.

In this connection, the Board contends that the test is not whether an employee was actually intimidated, but whether the employer's conduct may be reasonably said to interfere with the rights of employees. This,

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*References to the Transcript of Record are designated "R".

however, does not dispense with the need to present evidence. The mere statement of counsel that employees might fear reprisals is insufficient. Employees *might* fear reprisals as a result of any conduct of the employer, whether violative of the Act or not. Evidence must be presented from which the Court can reasonably infer that the employees have in fact been coerced. In the cases cited by the Board (Footnote 5, Pet. Br., p. 6), such evidence was presented.

For instance, in the case of *Joy Silk Mills v. N.L.R.B.*, 185 F. 2d 732 (C.A.D.C., 1950), cert. den. 341 U.S. 914, there was interrogation of individual employees, a promise of benefits, which is specifically proscribed by the Act, a threat to close down the mill, which is specifically proscribed by the Act, and a refusal to bargain with a union actually having a majority. It is significant that in discussing the scope of judicial review under the amended Act, the Court said:

> "What the amendment was intended to do was insure that in the fringe or borderline case, where the evidence affords but a tenuous foundation for the Board's findings, the Court of Appeals would scrutinize the entire record with care and be at liberty, where there is not 'substantial evidence' to modify or set aside the Board's findings." 185 F. 2d 732, 738.

In *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584 (1941), the Board is presumably relying upon the following language:

> "It would indeed be a rare case where the finders of fact could probe the precise factors of motivation which underlay each employee's choice. Normally,

> the conclusion that their choice was restrained by the employer's interference must of necessity be based on the existence of conditions or circumstances which the employer created or for which he was fairly responsible and as a result of which it may reasonably be inferred that the employees did not have that complete and unfettered freedom of choice which the Act contemplates." 311 U.S. 584, 588.

Facts, however, must be presented from which the inference could be drawn. In that case, the Court stated that "the whole congeries of facts before the Board supports its findings". There was evidence that the employer engaged in industrial espionage, maintained and, through its supervisory employees, promoted a company union, and that employees were discriminatorily discharged for union activities. This is substantial evidence from which inferences of a violation of the Act can reasonably be drawn.

In *Elastic Stop Nut Corp. v. N.L.R.B.,* 142 F. 2d 371 (C.A. 8, 1944), cert. den., 323 U.S. 722, which arose before the "free speech" amendment to the Act, the Board presumably relies upon the statement:

> "Where the conduct was coercive, as found here, it is not necessary to show that the coercive conduct had its desired or intended effect." 142 F. 2d 371, 377.

This, of course, does not free the Board from the necessity of showing that the conduct was coercive, or could reasonably be inferred to be so. Furthermore, that was a case in which rival unions were contending for the right to represent the employees and the em-

ployer was acting in favor of one of them. The Court said:

> "Under the statute it was the duty of petitioner to refrain from intrusion or interference since the question of choosing an organization for the purpose of collective bargaining was the exclusive concern and business of the employees." 142 F. 2d 371, 376.

Here, however, under the amended Act, the question of whether the employees are to have a union or not is not solely their concern. The employer is specifically given the right to express his "views, argument, or opinion" by Section 8 (c).

The issue is, therefor, whether there is any evidence before the Board of a violation of Section 8 (a) (1). Counsel's supposition that some hypothetical employee may have feared that his vote might have been disclosed would not be evidence under any state of facts; when it is expressly stipulated that the poll was in fact secret, such argument is thoroughly illegitimate.

The next argument is that the poll "conveyed . . . the 'fear of retaliation against the employees as a group should they oppose the desires of the employer'." (Pet. Br., p. 7). The point of this proposition is not entirely clear. It is admitted by Respondent that it made a speech to employees opposing the union, and it is admitted by the Petitioner that the speech was privileged under Section 8 (c); i.e., that it contained neither a promise of benefit nor a threat of reprisal. In what way the poll constituted a threat of reprisal that the speech did not is not explained by Petitioner, except that em-

ployees as a group may always fear some retaliation by the employer for preferring a union when the employer has expressed opposition to unionization. The Act, however, expressly gives the employer this privilege, so long as it is not abused by the making of threats. The Board somehow purports to find a threat in the taking of a secret poll, but it fails to explain why. There is no more reason for employees to expect retaliation for organizing a union when the employer makes an anti-union speech and then takes a poll, than when he merely makes the speech.

Moreover, the Respondent's speech specifically explained to the employees, not only that it would not retaliate against them if they organized, but that it could not legally do so (R., pp. 15-16, 18-19). The Petioner is once again hypothesizing about some suppositious employee who may be led to believe by the taking of a poll that his vote for a union might lead to economic sanctions, even through no threat of economic sanction was made. There is no evidence that any such timorous employee existed, or that he would not have been equally fearful because of the privileged speech in the absence of a poll. In fact, there is nothing charged here that would not be equally true in the absence of a poll. For support of the contention that the poll itself tended to coerce employees, we have the bare assertion of counsel, unsupported by proof.

The Board then argues that the last minute character of the speech, immediately preceding a poll controlled by Respondent, impeded and coerced the employees' choice, even though the speech itself was legal

(Pet. Br., p. 7). The argument would carry more weight were this election in any way binding upon the employees and not merely for the information of Roberts Brothers in determining the truth of the union's claim that it represented a majority of its employees. The Board cites *N.L.R.B. v. Syracuse Color Press, Inc.,* No. 99 (C.A. 2), decided Jan. 5, 1954, 33 L.R.R.M. 2334, to the effect that the step from interference to restraint is short (Pet. Br., p. 8). In context, that quotation reads:

> "Here the time, the place, the personnel involved, the information sought, and the employer's conceded preference, all must be considered in determining whether or not the actual or likely effect of the interrogations upon the employees constitutes interference, restraint or coercion. This effect is not always easy to discern, but here we have definite proof that the question as to membership propounded by respondent to two employees prompted at least one of them to reply untruthfully. He gave as his reason for the untruth, 'I would be put on the spot'. He also stated, 'I told him no, for the simple reason if I told him yes, I was afraid I might get the rest of the fellows . . .' Here is actual proof that the interrogation did, in fact, implant a fear that a truthful answer would be a matter of embarrassment either with fellow employees or with the management, or both. The step from embarrassment to restraint or intimidation is a short one." 33 L.R.R.M. 2334, 2336.

The difference between the *Syracuse* case and the present one is that in the former, the Board presented "actual proof" to support its contentions. Evidently the Board considers this an immaterial distinction; Respondent submits that this Court should not so lightly dismiss the difference.

Aside from that aspect, the *Syracuse* case, which is cited no less than five times by the Board (Pet. Br., pp. 6, 8, 9, 13), involved oral interrogations of individual employees which, of course, can constitute a basis for discrimination. Other than the speculations of counsel that this poll was not what all parties have stipulated it to be, there is no reasonable basis for inferring even a possibility of discrimination in the present case.

PETITIONER'S POINT B

Petitioner next argues that the poll, in effect, resolved the question of representation. Before going on to the merits of this contention, Respondent wishes to point out that this issue is not before the Court. The question of whether or not a poll by the employer of his employees wrongfully ousts the N.L.R.B of its jurisdiction, or unlawfully usurps the functions of a federal agency, may be a proper question for determination by a Court upon an appropriate record. Respondent will argue hereafter that it does not do so. But the Court will search in vain through the charge (R. p. 3), the complaint which superseded it (R., p. 6), and Petitioner's Statement of Points to be Relied Upon (R., p. 39), for any indications that this matter is at issue in the present case. The only question before the Court is whether Roberts Brothers interfered with, restrained or coerced its employees in their right of self organization. Insofar as the contention that the poll is coercive is concerned, that question is discussed under Section A of Petitioner's Brief. Petitioner recognizes this when it

begins its argument under Section B: "In addition to the coercive impact just described . . ." (Pet. Br., p. 9). Respondent contends that this question is not before the Court and should not be considered.

On the merits, the simple answer to Petitioner's assertion that this vote was an employer resolution of the question of representation is, that it simply is not so. The poll was solely for the information of Respondent. It had no binding effect of any kind and resolved nothing. The employees were probably aware of this to begin with, but there is no need to speculate because the record shows that they were so advised (R., pp. 20-21). Consequently, this was not an employer resolution of the question of representation, but merely, as the employees were told, "a secret ballot for our information."

The Board argues that this forces a union to a show of strength "at a stage of organization when employees have not had a full opportunity to persuade their fellow employees . . ." (Pet. Br., p. 10). In so doing it ignores the fact that this vote was precipitated by the union claim of majority representation and its demand that Roberts Brothers make no changes in the status of its employees pending further negotiations (R., pp. 11, 14).

If the union had not had a full opportunity to proceed, it should have refrained from making exaggerated claims. It is significant in this case that the union's charge contains an allegation that Respondent refused to bargain (R., p. 14), but that this could not even stand up under the investigation preliminary to issuing a complaint and, therefore, was not included in it (R.,

pp. 7-8). This evidences the Board's view at the time of the invalidity of the union's claim to majority status. In short, then, if the union felt it was not ready for an election, it should not have claimed that it had a majority. Having claimed one, it is hardly in a position to complain about the timing of the poll.

In any case, as petitioner recognizes, the Act no longer leaves even the time of official determination of majority status exclusively within the control of the union. The employer can petition for a representation election at any time after the union claims recognition (Section 9 (c) (1) (B)). This indicates that Congress does not consider it essential that the union have an unlimited time "to discuss with and inform the employees concerning matters involved in their choice," or even that the union, having once claimed a majority, need have any say on the subject of timing. In the present case, nothing was done until the union actually had made a claim that it represented a majority.

The Board also contends that the unfavorable results "provide the employer with an apparent basis for refusing to recognize a union when the union in fact represents a majority of the employees," and that this, therefore, tends to discourage further organizational efforts (Pet. Br., pp. 10-11). Once again, we find ourselves far beyond the limits of the record in this case. Not only was there no finding by the Board that the union had a majority, but the Board refused even to include the union's charge of refusal to bargain in its complaint. Had the union had a majority, which it did not, it is

mere guesswork to say that any employee who belonged to the union would vote against it in a secret ballot. Once again, the Board piles speculation upon conjecture to construct the tottering edifice to which it points as "evidence" of a violation of the Act.

Petitioner also contends that other methods were available to the employer to determine how his employees felt about the union and that where there is no compelling business reason, a vote should not be taken under conditions exclusively controlled by the employer (Pet. Br., p. 12). As for the lack of business reason, there is no evidence either way, but Respondent submits that the union's demand that it make no changes in the status of employees under the union's jurisdiction was ample reason. Otherwise, the employer might have to postpone or forego changes in wages and hours, grievance procedures, promotions, hiring and firing, and the multitude of other issues that fall within the scope of labor-management relations until a Board-ordered election could be held. This could take months. (See footnote 7, Pet. Br., p. 10.)

On the other hand, if Respondent did nothing, it was faced with a possibility that the Board might thereafter certify the union without an election on the ground that it did not have a bona fide doubt of the union's majority status. See, e.g., *N.L.R.B.v. Ken Rose Motors,* 193 F. 2d 769 (C.A. 1, 1952); *N.L.R.B v. Crown Can Co.,* 138 F. 2d 263 (C.A. 8, 1943). The Board suggests as an alternative a check of membership cards (Pet. Br., p. 12), but, after all, the Act gives the employer, as well as the

union, the right to express his views on unionization and the right to an impartial Board election. The number of individuals that the union has signed up by personal solicitation without the employer having an opportunity to express his views does not necessarily represent the number who will vote for the union in a Board-conducted election after due deliberation. In this regard, it is interesting that after charging that the poll herein was illegal because it was an employer resolution of the question of representation, the Board suggests a union resolution of the question as a legal alternative. Neither can or should be binding, in the absence of consent by the other party.

The purpose of this poll was for Respondent's information in conducting itself with respect to the union's claim. The results justified it in refusing to recognize that claim, subject, of course, to a Board election. Had the vote favored the union, Respondent might have recognized the union or petitioned for a Board-conducted election. But is it reasonable to require an employer to suspend its personnel practices until a Board-conducted election can be held, whenever a union makes an unfounded claim to a majority? Cannot an employer make for himself a preliminary determination whether there is a basis for a claim, and conduct himself accordingly? We must not lose sight of the fact that during an organizational campaign, or pending an N.L.R.B. election, an employer runs great risks if he discharges employees, or make changes in wages, hours, or working conditions. (See, e.g., *N.L.R.B. v. Electric City Dyeing Co.*, 178 F.

2d 980 (C.A. 3, 1950); *Atlanta Metallic Casket Co.,* 91 N.L.R.B. 1225, (1950).) This may be so even though the employee deserved discharge (*N.L.R.B. v. Electric City Dyeing Co.,* supra), or the benefits had been long planned. (*Minnesota Mining & Mfg. Co.,* 81 N.L.R.B 557 (1949).) Why should the employer be required to postpone such actions until the relatively ponderous machinery for a Board election goes into action, when there is in fact no basis for the union's claim?

But, over and above this, there is no showing whatever of unfairness, restraint or coercion in the manner of taking the poll. True, it was taken at the request of Respondent, for Respondent's information. But, beyond the fact that the poll was under the control of management, the only evidence is that it was a secret ballot. If the Board or the union had evidence that it was unfairly conducted they could and should have presented such evidence. Other than its bare assertion, the Board makes no showing that there was anything coercive in the manner of taking of a vote. The argument is completely circular; it states that this poll is coercive because polls are coercive, and polls are coercive because somebody might be coerced by them. The symmetry of the circle is unbroken by any evidence of coercion.

The difficulties in this case, including the fact that the Board has found it necessary to go outside the record so often may be traced to one of the pitfalls of the adminstrative process—the fact that the Board is confusing its rule-making and adjudicatory powers. It is completely in order for the Board, in laying down regulations

for the conduct of representation elections, to rule that speeches within the twenty-four hour period before the election shall henceforth be prohibited, because the Board thinks they are likely to have a coercive effect. This is proper rule-making and as the Board said, was instituted "pursuant to our statutory authority and obligation to conduct elections in circumstances and under conditions which will insure employees a free and untrammelled choice." *Peerless Plywood Company,* 107 N.L.R.B. No. 106, December 22, 1953.

The Board has power to make rules for the conduct of elections, but the statute prescribes what constitutes an unfair labor practice, and when a specific case comes up in which the Board must decide whether an unfair labor practice has been committed, it is exercising its adjudicatory function. Therefore, it is under the duty of finding facts to meet the statutory standard in the particular case. It cannot lay down a broad general rule and assume that corecion exists each and every time a poll is taken—the obligation placed upon it is to determine whether coercion did take place in the case before it.

In this type of situation the Board is acting in a quasi-judicial capacity, and as such is under much the same restrictions as a Court. A Court, for instance, can denominate certain acts indicia of fraud, but it cannot lay down a broad rule that wherever those facts appear there is fraud. The duty of the finder of fact is, ultimately, to find whether fraud existed, not whether the indicia existed. And so, in this case, the Board must at

least find that the circumstances here were such as could reasonably be inferred to be coercive in this precise situation.

Respondent submits that the stipulated facts are insufficient to support such a finding. As this Court has stated, "coerce," "restrain" and "interfere" are "strong words," not too lightly to be inferred. *Wayside Press v. N.L.R.B.,* 206 F. 2d 862 (C.A. 9, 1953.)

For the foregoing reasons, as the Second Circuit said in the *Syracuse* case, supra:

> "Judicial precedents are helpful but not conclusive. Of necessity, interference, restraint or coercion depend upon *the facts and circumstances of each individual case,* so that the inquiry here is directed to the evidentiary basis for the Board's order *in this particular case.*" (Emphasis supplied)

PETITIONER'S POINT C

Under this heading, the Board discusses a few of the cases cited by Respondent before it, and attempts to distinguish them. Before going into the questions herein raised, Respondent desires to discuss the cases cited earlier by the Board (Footnote 6, Pet. Br., p. 9), as judicial precedent for the coercive effect of employer-conducted elections. For convenience, they will be discussed in the order cited by the Board.

In the case of *N.L.R.B. v. Sunshine Mining Company,* 110 F. 2d 780 (C.A. 9, 1940) which took place before the "free speech" amendment was enacted, the poll was taken in an atmosphere of general labor unrest, strike agitation and opposition of the employer to the

union by having foremen circulate an anti-union petition. A company-dominated union was formed. Furthermore, the ballot itself was "skillfully worded so as to suggest adverse criticism of the Union," p. 786. This case is distinguishable not only on the facts, but on the law, which at that time did not permit an employer to attempt to influence his employees' choice.

The next four cases all involve company unions, and all were prior to the "free speech" amendment. The employer was then under a duty to be neutral between unions, and in each of these cases he indicated his support of the company union prior to or during the poll. Each of them is not only distinguishable, but totally irrelevant, and they are discussed only briefly.

In *N.L.R.B. v. Tehel Bottling Company,* 129 F. 2d 250 (C.A. 8, 1942), the employer suggested the formation of the company union, contributed to it and allowed it to hold meetings on company premises. The poll involved was taken at one of such meetings. The Court held that the entire record supported the contention of the Board that the employer unlawfully displayed his preference for the company union.

In *N.L.R.B. v. Colten,* 105 F. 2d 179 (C.A. 6, 1939), not only did the employer express an unlawful preference, but the Court stated at page 182 that "[t]here is substantial evidence that the vote was neither secret nor uninfluenced," and further that "[t]here was evidence that the manner in which the vote was taken engendered fear among the employees of unfortunate consequences

if it resulted unfavorably to the management." Furthermore, there is evidence that workers were warned that they would lose their jobs and that Respondent threatened to go out of bsuiness. The order enforced in that case provided, inter alia, that Respondent cease and desist from discouraging membership in the union. Such an order would be wholly illegitimate under the present Act.

In *N.L.R.B. v. Burry Biscuit Corp.,* 123 F. 2d 540 (C.A. 7, 1941), the employer suggested an attorney for the company union, allowed it to hold meetings on the company's time, which the supervisors urged employees to attend, and took a poll at one of such meetings without the competing union being on the ballot. The Court, while stating that this was a "border-line" case (p. 543) held that this constituted a showing of preference for the company union and violated the employer's duty to be neutral.

In *Titan Metal Mfg. Co. v. N.L.R.B.,* 106 F. 2d 254 (C.A. 3, 1939), cert. den., 308 U.S. 615, the Court indicated that "neutrality is the touchstone" (p. 257) to be used in deciding company union cases. The Court found that neutrality had been violated by threats to close the plant or move it if the union came in, and by a ballot which proclaimed on its face that it was "official," but contained information favorable to the company union.

In the case of *N.L.R.B. v. Sommerville Buick,* 194 F. 2d 56 (C.A. 1, 1952), which is the only case cited to be decided after the 1947 amendment, there are several clearly distinguishing factors. The speech made by the employer prior to the poll was not privileged, but con-

tained an unlawful threat to close his plant. The company president individually interrogated employees prior to the poll. And, most coercive of all, three leaders of the union were discriminatorily discharged the day before the poll was taken. Under these circumstances, the entire record as a whole showed violations of the Act. The case certainly cannot support the proposition for which it is cited, that a poll in and of itself is coercion.

Under Section C, part 1 of its Brief, Petitioner argues that since the evidence shows an unfair labor practice, the absence of other unfair labor practices should not affect the decision. Respondent has no quarrel with the principle that "the Act prohibits *any* interference, restraint or coercion," enunciated by Petitioner (Pet. Br., p. 13). Respondent's argument was that a poll, without more, does not constitute an unfair labor practice, and that no inference of coercion is permissible from a poll alone, or together with a legal speech, in the absence of threats, or other attendant conduct which makes it a reasonable inference that a poll may have helped to produce a coercive effect. Cf. *Sax v. N.L.R.B.,* 171 F. 2d 769 (C.A. 7, 1948); *N.L.R.B. v. England Bros., Inc.,* 201 F. 2d 395 (C.A. 1, 1953).

Under part 2, Petitioner argues that the poll, standing alone, is coercive, and that it does not gain any immunity because the speech preceding it is legal (Pet. Br., p. 13). The force of this argument is completely vitiated by the decision in *Howard W. Davis d/b/a The Walmac Company,* 106 N.L.R.B. No. 244, decided October 29, 1953, 33 L.R.R.M 1019 (Footnote 9, Pet. Br., p. 14),

wherein the Board held that a poll standing alone, was not an unfair labor practice. If a poll is coercive, regardless of the circumstances, *Walmac* was incorrectly decided. Obviously, from that decision, the Board itself does not take so broad a view of the evils of polling as it is here asserting. Apparently, Petitioner's position boils down to this: by making a legal speech, Roberts Brothers rendered an otherwise non-coercive act coercive. If the speech had not been made the *Walmac* decision would have controlled.

Respondent submits that the policy of the Act is to permit the employer to express his views freely. It would violate this policy and defeat the Congressional intent to allow the Board to rule that an otherwise legal speech can convert a non-coercive action into a coercive one. In effect, the Board argues that a speech containing no threat of reprisal or promise of benefit may nontheless be illegal because of its proximity to otherwise legitimate conduct. The Act makes no such exception.

With respect to part 3 (Pet. Br., p. 13), Respondent admits that it can cite no case precisely in point; nor has Petitioner done so. But Respondent can cite cases which are, on their facts, considerably closer to the present case than any cited by the Board.

In the case of *Wayside Press v. N.L.R.B.,* 206 F. 2d 862 (C.A. 9, 1953), this Court considered the effect of a question on the employer's application blank concerning the applicant's union affiliation. Certainly such "mass interrogation," to use the Board's phrase, would be far more likely to instill a fear of discrimination than a

secret ballot, since each employee must reveal his individual position. Furthermore, opposition to the union might very well be implied in such a situation even though not expressed by the employer. What other reason might he have for inquiring about the union status of job applicants? Still, this Court held that in the absence of overt hostility to the union and without evidence of actual discrimination, such interrogation was not an unfair labor practice. Respondent feels that the employer's conduct in that case was far more likely to be coercive than in the present case.

N.L.R.B. v. Kingston, 172 F. 2d 771 (C.A. 6, 1949), it is true, did not involve hostility to the union, but if it does nothing else, it certainly refutes the Board's contention that a poll standing alone is coercive. This leaves the Board in the uncomfortable position of arguing that although Respondent's speech was expressly permitted by the Act, there would have been no unfair labor practice without it. Such a rule cannot be reconciled with the policy of the amended Act to permit employers freely to express their views in a legitimate manner.

In *N.L.R.B. v. Montgomery Ward & Co.,* 192 F. 2d 160 (C.A. 2, 1951), the facts showed that there was opposition to the union expressed, and inquiries made by the management of individual employees. Although approving the Board's finding that an employee had been discriminatorily discharged, the Court went on to say, "but inquiries concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constitute no threat of in-

timidation, or promise of favor or benefit in return for resistance to the union, were not unlawful, particularly after the 1947 amendment of the Act found in Section 8 (c), 29 U.S.C.A. Section 158 (c)."

Although this case may be dismissed by the Board as one of isolated cases of interrogation (Pet. Br., p. 5), Respondent submits that even isolated instances of personal questioning of individual employees are more likely to have a coercive affect than a secret poll of the entire working force. The former, at least, afford a basis for possible discrimination. Respondent believes that the *Montgomery Ward* case goes further on its facts than the present one, since it involves hostility to unions, plus individual interrogation.

In *N.L.R.B. v. England Bros., Inc.*, 201 F. 2d 395 (C.A. 1, 1953), the supervisors were told to advise the employees that the company was "opposed to having a union in our store because we felt we would prefer to deal directly with our employees, rather than with them through any outside organization." After this hostile attitude had been expressed, supervisory employees interrogated individual members of the working force concerning the union. The Court denied the Board's petition for enforcement, holding that in the absence of "an *illegal* anti-union attitude or background," (emphasis supplied) the Board could not rely upon an "aroma of coercion" as in *Joy Silk Mills v. N.L.R.B.*, supra, but must show something coercive. This is precisely what Respondent argued before the Board. (See Petitioner's Brief, Section C, Part 1, p. 12.)

Furthermore, the Court quoted with approval from *Sax v. N.L.R.B.*, 171 F. 2d 769, 773 (C.A. 7, 1948), the following language:

> "No case has been cited and we know of none holding the view asserted by the Board here. The cases cited by the Board all involve a course of conduct of which the interrogatories as to membership and activity of a union were only a part of the whole picture. In none of them did the mere words of inquiry stand alone."

The Board has here attempted to argue that the words of inquiry did not stand alone, but all it has been able to point to is an admittedly legal speech. This factor also existed in the *England Bros.* case, and the Court properly refused to take it into consideration. To do otherwise would be to predicate an unfair labor practice upon conduct which the Act specifically and expressly authorizes.

Respondent contends that this case, too, goes beyond the facts of the present case, because it involved overt hostility to the union, plus individual interrogation rather than a secret poll.

CONCLUSION

Interrogation or polling of employees, either individually or as a group, is not an unfair labor practice in the absence of other conduct rendering the interrogation or poll coercive. *Sax v. N.L.R.B., N.L.R.B. v. England Bros., Inc., Wayside Press v. N.L.R.B., N.L.R.B. v. Kingston, Howard W. Davis, d/b/a The Walmac Company,* all supra.

The only other conduct involved in this case is a speech which the Act expressly permitted the employer to make. It would be carving a wholly unwarranted exception out of Section 8 (c) to say that a legal speech, while not itself a violation of the Act, can render otherwise lawful conduct unlawful. There is no substantial evidence to support the Board's Findings and Order, and the petition for enforcement should be denied.

Respectfully submitted,

ROSENBERG, SWIRE & COAN,

ABE EUGENE ROSENBERG,
PHILIP A. LEVIN,

Of Counsel,
Respondent, Roberts Bros.

March, 1954

No. 14,120

IN THE

United States Court of Appeals

For the Ninth Circuit

BENJAMIN F. RAYBORN,

Appellant,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
422 Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

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No. 14,120

IN THE

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BENJAMIN F. RAYBORN,

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EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Judge Oliver J. Carter, entered on August 31, 1953, discharging an order to show cause and denying a petition for a writ of habeas corpus (Tr. 40, 41). Jurisdiction is invoked by appellant under Title 28, United States Code, 2241, 2243, 2253.

STATEMENT OF THE CASE.

On March 18, 1947 appellant was sentenced upon a conviction under Section 101 of Title 18 United States

Code (Tr. 10). The indictment charged that appellant did receive, sell and have in his possession with intent to convert to his own use, property of the United States, to-wit, submachine guns which had theretofore been embezzled, stolen or purloined by another person, knowing same to have been so embezzled, stolen and purloined; and transported and shipped in interstate commerce stolen firearms and a quantity of ammunition knowing same to have been stolen, and the defendant then being a fugitive from justice. Appellant was sentenced to thirty years, to be served concurrently with a state life sentence for armed robbery, which the defendant was then serving (Tr. 10, 13). The Court further ordered that the defendant be returned to the custody of the state authorities for continuation of his life sentence (Tr. 10).

On September 11, 1952 appellant was transferred from the Kentucky State Penitentiary to the United States Penitentiary, Terre Haute, Indiana (Tr. 30). Subsequently appellant was transferred to the United States Penitentiary at Alcatraz Island, California (Tr. 32). The Kentucky authorities have placed a detainer on appellant. At the expiration of his federal sentence he will serve the remainder of his Kentucky term (Tr. 16, 31).

QUESTION PRESENTED.

Is appellant's confinement in the United States Penitentiary at Alcatraz Island, California, lawful, notwithstanding the order of the sentencing Court that

he be returned to the Kentucky State Authorities for continuation of his life sentence?

SPECIFICATION OF ERROR.

Appellant specifies as error the following:

1. The District Court erred in holding that the transfer to Federal prison was not premature and unlawful.

2. The District Court erred in its conclusion of law that the case of *Banghart v. Swope,* 9th Cir., 175 F. 2d 442, controls the instant case.

ARGUMENT.

Appellant argues that his transfer from the State to the Federal authorities, despite the sentencing judge's order that he be returned to his Kentucky confinement, was unlawful and therefore he should be discharged from custody.

In *Banghart v. Swope,* 9th Cir., 175 F. 2d 442, the District Judge had ordered the defendant to be returned to the State authorities. He later escaped from the Illinois State Penitentiary and after apprehension, was transferred by the Attorney General to the United States Penitentiary at Alcatraz Island, California. Banghart also contended that since the trial Court had fixed the place of confinement, the Attorney General had no power to remove him to Alcatraz. This Court held, however, that Section 4082 (then 753(f))

of Title 18, United States Code, deprived trial Courts of the power to designate the place of confinement, and that consequently, the Attorney General lawfully exercised his power in transferring Banghart to a Federal Prison.

Petitioner here argues that a distinction exists between Banghart's and his case. Banghart was apprehended by Federal authorities after his escape, while appellant was at all times within the confines of the State Penitentiary. In addition, he argues that the additional clause in the instant sentence, that he "be turned over to the custody of the Attorney General to complete the sentence in this case" alters the situation at bar.

In the case of *Mahoney v. Johnston,* 9th Cir., 144 F. 2d 663, the defendants were surrendered by the Louisiana authorities to the Attorney General, who confined them at Alcatraz. This Court there held that the trial judge's sentence did not and could not provide that their Federal sentence could only be served in the Louisiana State Penitentiary. "The sentence does not so read and the Court has no power to make such a commitment; it must commit the prisoner to the custody of the Attorney General, who determines the particular penitentiary for the prisoner's confinement." *Mahoney v. Johnston,* supra, at 664.

The principle is clear that under Section 4082 the Attorney General is authorized to designate the institution in which a Federal prisoner shall be confined and to order a prisoner transferred from one in-

stitution to another. *Garcia v. Steele,* 193 F. 2d 276, 278; *Stroud v. Johnston,* 9th Cir., 139 F. 2d 171, 173. The place of confinement is no part of the sentence, but is a matter for the determination of the Attorney General. *Bowen v. United States,* 174 F. 2d 323, 324.

Prior to the present section trial Courts had the power to designate the place of confinement. Since, however, the enactment of this section the place where the sentence is to be served is within the power of the Attorney General of the United States. The Attorney General has exercised that power by the confinement about which this defendant complains. It makes no difference that the trial judge ordered a transfer to be made at a later time. His order was without effect, since by law the sentence could not designate the place of confinement.

There is no question in the instant case of any arbitrary, capricious, or abusive use of the Attorney General's authority. Appellant's transfer to Federal authorities was effected following a riot at the Kentucky Prison (Tr. 18). Since there is no evidence to the contrary, we must assume that the Attorney General used proper discretion in arranging Rayborn's transfer.

CONCLUSION.

The United States respectfully submits that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
December 21, 1953.

LLOYD H. BURKE,
United States Attorney,
RICHARD H. FOSTER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 14142

United States
Court of Appeals
for the Ninth Circuit.

THOMAS M. ROBINSON, Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

NOEL ANDERSON,

Appellee.

Transcript of Record

Appeal from the United States District Court for the for the District of Montana

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—2-19-54

No. 14142

United States
Court of Appeals
for the Ninth Circuit.

THOMAS M. ROBINSON, Collector of Internal Revenue for the District of Montana,

Appellant,

vs.

NOEL ANDERSON,

Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Witnesses—(Continued)

NAMES AND ADDRESSES OF ATTORNEYS

VERNON LEWIS,
Fort Benton, Montana,
For Plaintiff.

KREST CYR,
United States Attorney,
Butte, Montana,
For Defendant.

District Court of the United States for the District of Montana

Civil Action, File Number 490

Great Falls No. 1306

NOEL ANDERSON,

Plaintiff,

vs.

THOMAS M. ROBINSON, Collector of United States Internal Revenue for the District of Montana, at Helena, Montana,

Defendant.

COMPLAINT

Plaintiff complains of the defendant and for cause of action alleges:

I.

This is an action based upon the laws of Congress, to wit: Internal Revenue Code Sec. 322 (Sec. 29.322, 1 to 3), and is for the recovery of income tax alleged to be erroneously and unlawfully assessed and collected by Thomas M. Robinson, Collector of United States Internal Revenue for the District of Montana at Helena, Montana. The jurisdiction of this Court is based on Paragraph 20(a), Section 24 of the Judicial Code as amended February 24, 1925, (40 Stat. 972C309, 28 USCA Par. 41, (20)), whereby concurrent jurisdiction with the United States Court of Claims is conferred on District Courts of the United States in suits for the recovery of income tax even if the claim exceeds $10,000.00

II.

That Thomas M. Robinson (hereinafter referred to as the Collector) was at all times hereinafter mentioned and now is the Collector of United States Internal Revenue for the District of Montana with his office at Helena, Montana.

III.

That on or about the 28th day of December, 1944, this Plaintiff entered into a partnership agreement with his wife, Agnes Anderson and his two sons, Noel J. Anderson and Robert M. Anderson, for the purpose of carrying on farming and livestock operations in Chouteau County, Montana. That said partnership agreement provided that Noel Anderson and Agnes Anderson should each own an undivided one-third interest in said partnership and that Noel J. Anderson and Robert M. Anderson should each own an undivided one-sixth interest in said partnership, and that each of said partners would share in the profits and be liable for any losses in the respective shares above set forth. That at the time of the formation of said partnership the said Noel Anderson, Plaintiff, and Agnes Anderson were the owners of a stock and wheat ranch with all necessary farming equipment and fully stocked with cattle. That it was agreed at the time of the formation of said partnership that a conservative value of said lands, farming equipment and cattle was $45,000.00, and plaintiff alleges that said property at the time of the formation of said partnership was of the

reasonable value of $45,000.00. That in consideration for the services of the two sons, Noel J. Anderson and Robert M. Anderson, in helping to build up and accumulate said property, they would be permitted to become partners in the shares heretofore stated; each to pay the sum of $7,500.00 for the one-sixth interest in said partnership, and that the payments were to be made from their shares of the earnings of said partnership beginning on January 1, 1945. It was further agreed that the name of said partnership was to be Noel Anderson & Sons, and that each member of the partnership was to perform such services as might be necessary to properly conduct the farming and livestock operations. That each of said partners thereupon and during the year 1945 performed such services as were necessary in and about the conducting of said partnership. That at the close of the first year's operation and annually since said date Noel J. Anderson and Robert M. Anderson were each credited with one-sixth of the net earnings of said partnership for the previous year against the indebtedness owing by each to plaintiff and Agnes Anderson for the purchase of their respective shares in said partnership. That following the close of the first year's operation of said partnership and on or about January 15, 1946, this Plaintiff duly and regularly filed a partnership return for the year 1945 in which the respective shares of the net earnings of said partners were set forth, and each member of the partnership at the same time duly and regularly filed Individual Income Tax Returns in which each re-

ported the correct tax liability on said respective share of the net earnings of said partnership and each paid to the Collector the amount of tax so assessed on said Returns.

IV.

That on or about the 7th day of May, 1947, a field agent of the Bureau of Internal Revenue made a field audit of the books and records of the partnership of Noel Anderson & Sons, and of the Plaintiff, with the view of determining Plaintiff's liability for the year 1945, and in due course made a report to the Internal Revenue Agent in charge at Salt Lake City, Utah, in which he refused to recognize the validity of the partnership for income tax purposes and held that the entire earnings of said partnership was the income of plaintiff and showed an additional tax due from the Plaintiff for the year 1945; and the Plaintiff was duly advised of the findings and promptly protested the same.

V.

That in the month of May, 1949, the Commissioner of Internal Revenue in determining the issues as presented by the Field Agent and Plaintiff's protest finally determined that there was due from the Plaintiff an additional tax for the year 1945, after allowing all payments theretofore made and adding interest to November 10, 1949, at the rate allowed by law, in the sum of $10,292.84. That the Collector promptly called upon the Plaintiff for the payment

of said additional tax and said amount was on November 10, 1949, paid by the Plaintiff to the Defendant, Thomas M. Robinson, as Collector aforesaid.

VI.

That on or about the 24th day of November, 1949, Plaintiff duly filed with the said Collector of Internal Revenue at Helena, Montana, for the consideration of the Commissioner his claim for refund for said sum illegally collected. A copy of which claim is attached hereto and marked Exhibit "A," and made a part hereof.

VII.

That on or about the 14th day of April, 1950, the Commissioner of Internal Revenue advised Plaintiff that his claim for refund had been rejected.

VIII.

That the collection of said $10,292.84 as a balance of the tax liability for the year 1945 was erroneously and illegally collected from the Plaintiff.

IX.

That the Plaintiff is entitled to refund of the said sum of $10,292.84 with interest at 6% per annum from the date said sum was paid, to wit: November 10, 1949, and that the Defendant is indebted to the Plaintiff for the said sum with interest as provided by law.

Wherefore, Plaintiff prays a judgement or decree

against Thomas M. Robinson, Collector of United States Internal Revenue for the District of Montana, upon the facts and law, for the principal sum of $10,292.84 with interest at 6% per annum from November 10, 1949, together with his reasonable costs and disbursements and for such other and further relief in the premises as may be just.

/s/ VERNON E. LEWIS,
Attorney for Plaintiff.

EXHIBIT "A"

Form 843
Treasury Department
Internal Revenue Service

Claim

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

☐ Refund of Taxes Illegally, Erroneously, or Excessively Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift or income taxes).

State of Montana,
County of Chouteau—ss.

Name of taxpayer or purchaser of stamps: Noel Anderson.

Business address: Fort Benton, Montana.

Residence: Fort Benton, Montana.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: District of Montana, Helena, Montana.
2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from January 1, 1945, to January 1, 1946.
3. Character of assessment or tax: Deficiency on Income Tax.
4. Amount of assessment, including tax, $10,292.84; dates of payment: November 10, 1949.
5. Date stamps were purchased from the government: .....
6. Amount to be refunded: "interest to be added from November 10, 1949," $10,292.84.
7. Amount to be abated (not applicable to income, gift, or estate taxes): .....
8. The time within which this claim may be legally filed expires, under section 29.322-3 of Internal Revenue Code on November 10, 1951.

The deponent verily believes that this claim should be allowed for the following reasons:

Income Tax Returns for Noel Anderson and Sons were filed in due course for the year 1945. On April 7, 1947, the Internal Revenue agent made report showing certain errors in Income included in this partnership which should have been included in the Individual return of Noel Anderson. The agent also found no partnership existing for tax purposes. The undersigned resisted the additional assessment to cover the above-mentioned error and amended returns were filed for said partnership and the individual members thereof on June 16, 1947, and Noel Anderson paid an additional tax of $3,586.82, plus interest of $269.01, a total of $3,855.83. After conference with the technical staff the holding of the Internal Revenue agent as to the partnership was affirmed and deficiency tax in the sum of $12,183.70. was assessed. Credit was not given for the $3,855.83 payment. Interest was computed $1,964.97 and later the collector allowed a credit of $3,855.83 leaving a balance of $10,292.84 which Noel Anderson paid on November 10, 1949. This claim for refund is based upon the amended returns as filed on June 16, 1947. Taxpayer insists that a good and valid partnership was organized and began business on January 1, 1945, under the name of Noel Anderson and Sons. That said partnership consists of himself ⅓ interest, his wife, Agnes Anderson 1/3 interest, his son Noel J. Anderson 1/6 interest, and his son Robert Anderson 1/6 interest. That said partnership has

been in existence and has actively carried on farming and livestock business at all times since January 1, 1945. That each partner has contributed capital and services in each and every year since said date and that said partnership should be allowed for income tax purposes and that the above-mentioned amount should be refunded to the undersigned.

/s/ NOEL ANDERSON.

Subscribed and sworn to before me this 23rd day of November, 1949.

[Seal] W. S. TOWNER,
Notary Public for the State of Montana. Residing at Fort Benton, Montana.
My commission expires Jan. 5, 1952.

[Endorsed]: Filed September 8, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant above named and moves the Court that this cause be dismissed upon the following grounds, to wit:

That the complaint herein fails to state a claim upon which relief can be granted.

/s/ JOHN B. TANSIL,
United States Attorney for
the District of Montana;

/s/ HARLOW PEASE,
Assistant United States Attorney for the District of Montana;

/s/ H. D. CARMICHAEL,
Assistant United States Attorney for the District of Montana, Attorneys for Defendant.

[Endorsed]: Filed November 4, 1950.

[Title of District Court and Cause.]

ANSWER

Thomas M. Robinson, Collector of Internal Revenue for the District of Montana, by his attorney John B. Tansil, United States Attorney for the District of Montana, answering the allegations in plaintiff's complaint herein:

First

Denies the allegations of such complaint not admitted; qualified or otherwise specifically referred to below:

Second

Further answering the complaint:

I.

Denies the allegations in paragraph I, but admits that the Court has jurisdiction in this civil action to recover internal revenue tax pursuant to express authority contained in Title 28, U.S.C., Section 1340

and Section 3772(a)(1) and (2) of the Internal Revenue Code.

II.

Denies the allegations in paragraph II, except to admit that Thomas M. Robinson is now and has been since July 1, 1947, the Collector of Internal Revenue for the District of Montana with his office at Helena, Montana.

III.

Denies the allegations in paragraph III, except to admit (1) that a partnership return of income for the calendar year 1945 on Treasury Form 1065 was filed by Noel Anderson & Sons, Ft. Benton, Montana, on January 15, 1946, reporting an ordinary net income of $34,448.21 and showing partners' shares of income as follows:

(a)	Noel Anderson	$11,482.77
(b)	Agnes Anderson	11,482.77
(c)	Noel Anderson, Jr.	5,741.38
(d)	Robert Anderson	5,741.38
	Total	$34,448.30

(2) That on January 15, 1946, each of the four individuals named above separately filed a federal income tax return for the calendar year 1945 and therein reported as ordinary net income the same amount which appears after their names in the above tabulation; (3) that the individual federal income tax return filed by the plaintiff reported a total tax of $2,984.62, which was paid January 30,

1946; that the return filed by Agnes Anderson also reported a tax of $2,984.62, which was paid January 30, 1946; and that the separate returns filed by Noel Anderson, Jr., and by Robert M. Anderson each reported a tax of $1,174.90 and these sums were paid January 30, 1946.

IV.

Admits the allegations in paragraph IV, except to aver that the word "May" appearing in the first line of paragraph IV of the complaint should read "April."

V.

Denies the allegations in paragraph V, except to admit that the defendant, pursuant to the assessment by the Commissioner of Internal Revenue of a deficiency against the plaintiff upon his individual federal income tax return for the calendar year 1945, did promptly call upon the plaintiff for the payment of the sum of $10,292.84, which sum was paid by the plaintiff to the defendant on November 16, 1949.

VI.

Denies the allegations in paragraph VI, except to admit that Exhibit "A" which is attached to the complaint is a copy of a claim for refund which the plaintiff filed with the defendant on November 25, 1949. Any statement in Exhibit "A" not expressly admitted in this answer is specifically denied.

VII.

Denies the allegations of paragraphs VII, VIII, and IX of plaintiff's complaint.

Wherefore, the defendant, having fully answered plaintiff's complaint, prays that he take nothing in this suit; that his complaint be dismissed; and that the defendant be allowed his costs herein.

/s/ JOHN B. TANSIL,
United States Attorney for
the District of Montana;

/s/ HARLOW PEASE,
Assistant United States Attorney for the District of Montana;

/s/ H. D. CARMICHAEL,
Assistant United States Attorney for the District of Montana, Attorneys for Defendant.

[Endorsed]: Filed December 8, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS

Civil No. 1306

Now comes the defendant, Thomas M. Robinson, by and through his attorneys of record, Emmett C. Angland and William H. Bowen, at the close of the plaintiff's evidence and moves the court, in accordance with Rule 41(b) of the Federal Rules of Civil Procedure, to dismiss the action upon the ground

that upon the facts and the law the plaintiff has shown no right to relief on the grounds:

1. The determination of the Commissioner of Internal Revenue that the wife and two sons were not partners puts the burden of proof upon this plaintiff to convince the Court that the Commissioner's determination was wrong.

Welch vs. Helvering,
290 U.S. 111.

Commissioner vs. Heininger,
320 U.S. 467.

2. Upon motion to dismiss in non-jury cases after conclusion of the plaintiff's evidence it is not sufficient that the plaintiff establish a prima facie case inasmuch as the adjudication is upon the merits, but in this Circuit it must be made to appear from a preponderance of the evidence that the Commissioner's determination was in error and, further that in fact a present partnership existed.

Barr vs. Equitable Life Assur. Soc.,
(C. A. 9th) 149 F. 2d 634.

Defense Supplies Corp vs. Lawrence Warehouse Co.,

(N. D. Cal.) 67 F. Supp. 16.

Comment, 9 F. Rules Service, p. 37.

3. To satisfy his burden of proving that a present partnership in fact existed the plaintiff must show from all the facts adduced that "the parties

in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise. (Emphasis added.)

Commissioner vs. Culbertson,
337 U.S. 733, 742.

Harkness vs. Commissioner,
(C.A. 9th) 193 F. 2d 655.

Toor vs. Westover,
(S.D. Cal.) 94 F. Supp. 860.

The Culbertson criteria are well known and are applied to the facts, or the absence of any showing in the case at bar, as follows:

(a.) The agreement: No evidence is in the record of a partnership agreement as of January 1, 1945, other than the interested testimony of the family parties themselves.

(b.) The conduct of the partners in execution of the asserted partnership agreement: There is no clearer concept relative to the determination of the question of intent than that "People intend the consequences of their acts." Lusthaus vs. Commissioner, Reed, J. dissenting, 327 U.S. 293, 302. Yet here not one iota of evidence has been introduced by this plaintiff to show dealings with third parties, either by himself or by any of the alleged partners during the year 1945. To the contrary, it is clear from the records of the Chouteau County Bank, the Montana State Livestock Commission, and the Adams Implement Company of Fort Benton, to-

gether with plaintiff's own admissions that County property taxes were paid and business with the Fort Benton A.A.A. Office and the Greeley Elevator Company was carried on in either his own name, the name of A. E. Anderson or A. E. Anderson and Son, and that as late as 1946 and 1947 plaintiff was still making application with the Montana Equalization Board for gas refunds in his own name, rather than in the name of Noel Anderson and Sons.

(c.) Their statements: Plaintiff said that one of the purposes in forming the asserted partnership was to give his sons something more than wages. He also admitted that he was aware of and considered the tax savings advantage of splitting his income four ways through the vehicle of a partnership. Considering the restrictions plaintiff placed on the other alleged partners regarding their withdrawal of purported partnership funds, which restrictions continued until their respective interests were paid for, together with the use they put these monies to, plaintiff's domination of the family farm is clear. With regard to the restriction on use of the funds see subparagraph (g), infra.

(d.) Testimony of disinterested witnesses: Other than the testimony of their neighbor, Mr. Ritman, plaintiff made no effort to get into the record this very important factor. And yet, when questioned on cross-examination it became clear that Mr. Ritman having been in the Armed Service from early 1942 until the middle of September, 1945, could not recall and admitted that he did not transact any

business with the Anderson family as a partnership in 1945.

(e.) Relationship of the parties: The family relation of the Andersons, in the language of the Culbertson case is "a warning that things may not be what they seem," Id. p. 746; and said family relationship will be and should be carefully scrutinized. "* * * the family relationship often makes it possible for one to shift tax incidence by surface changes of ownership without disturbing in the least his dominion and control over the subject of the gift or the purposes for which the income from the property is used." Id. 746. See also subparagraph (g), infra.

(f.) 1. Their respective abilities: Remembering that the boys were 17 and 18, respectively, during the period in issue and were doing ordinary field work when they were there to work, and that Mrs. Anderson was a fine but average housewife, defendant respectfully asks the Court to judicially know that these three alleged partners contributed no more to the family farm than they would have without assuming the habiliment of a partnership operation and no more than any other farm family does the country over.

2. Capital contributions: There is completely lacking with respect to this very important factor, Harkness vs. Commissioner, supra, any evidence of a present contribution of any capital by anyone other than plaintiff; but, to the contrary, it clearly

appears that the sons and Mrs. Anderson would have nothing to contribute to the partnership until they earned it and that was not until May 15, 1951.

(g.) Actual control of income and the purposes for which it was used: It is patently clear in the year 1945 that the plaintiff had complete control of the allocation of income earned. He was the only person certified to draw against the account of A. E. Anderson and Son maintained with the Chouteau County Bank, which account was used that year, by his own admission, for alleged Noel Anderson and Sons' purposes. There was no account in existence in the name of Noel Anderson and Sons until May 1, 1946, and only plaintiff and his wife was certified to draw against it. It is also clear from the testimony of the boys and of Mrs. Anderson that their purported distributive shares of the partnership income was used for their necessaries; and as to the boys, particularly, could not be used for anything else until 1951, the date that they were deeded a one-sixth interest in the family farm.

(h.) Business purpose: There is not one scintilla of evidence to shows a business purpose herein for the establishment of the alleged partnership, but, to the contrary, by plaintiff's own admission he was considering the tax advantages that would derive therefrom together with a purpose to give the boys something more than wages, both of which are purely personal.

(i.) Present conduct of the enterprise as a partnership: The Culbertson and the Harkness cases

make it abundantly clear that the crucial question in every case is whether the asserted partnership arrangement was really and truly intended to begin at once or whether it was to begin at some future time. An intent to form a partnership at a future time, when, herein for example, Noel, Jr., would be home from the Armed Service, Robert would be home from College, and Mrs. Anderson, Noel, Jr., and Robert would have earned their respective interests in the family farm so that they could make a contribution to capital, and when probate of the Estate of A. E. Anderson was finally settled, is not sufficient to satisfy the requirements of intent presently to join in the conduct of the partnership enterprise. There is no evidence in the record, other than the families' interested statements of what they intended, to prove present action as a partnership. Good faith intent in the future is not enough.

Respectfully submitted.

/s/ EMMETT C. ANGLAND,

/s/ WILLIAM H. BOWEN,

Attorneys for Defendant.

[Endorsed]: Filed December 13, 1952.

[Title of District Court and Cause.]

DECISION

This is an action brought by the plaintiff as a taxpayer for recovery of an income tax paid for the year 1945. The principal question for determination seems to be whether Noel Anderson, the plaintiff, and his family, consisting of his wife and his two sons, entered into and put in operation a family partnership, in good faith, for the conduct of their farming and ranching business and the raising of livestock in Chouteau County, State of Montana, for the year 1945.

Noel Anderson for many years was a member of a family partnership with his father, under the firm name of A. E. Anderson and Son, and was engaged in farming and raising livestock near Fort Benton, in the County and State aforesaid, which partnership was recognized and apparently approved by the Bureau of Internal Revenue; the lands and personal property occupied and possessed by the partnership stood in the name of A. E. Anderson, the father; the business of the partnership was usually transacted in his name, the bank account was in his name, although Noel Anderson had his own privite bank account which he afterwards changed to a joint account with his wife, Agnes, both having the right to draw checks against this account.

A. E. Anderson, the father, died in December, 1943, and thereafter Noel Anderson carried on in the name of the father and son partnership while the estate of the father and affairs of the partner-

ship were in process of adjustment and settlement. But there was nothing in this situation, so far as the court can find, to hinder or delay Noel Anderson and his family from entering into a family partnership; it was their responsibility to carry on the farming and ranching operations and take care of the livestock. Aside from Noel Anderson the only persons interested as heirs of A. E. Anderson were the widow and a daughter, from whom purchases were made by Noel Anderson of their respective interests in the estate, consequently, the care and management of all such property interests were undertaken and carried out by Noel Anderson, his wife, Agnes, and his sons, Robert M. and Noel J. Anderson, who comprised the partnership of Noel Anderson and Sons.

There was nothing new or novel about having a family partnership in the Anderson family; the father and son had carried on such a partnership in the name of A. E. Anderson & Son for about nine years, and it was quite natural to expect that upon the death of the father another family partnership would succeed the old one. It is generally known that the principal farming operations are carried on in the spring, summer and fall, and the sons were there in 1944 to prepare the soil and put in the crops for 1945, and in 1945 Robert was there to put in crops for 1946, and substitute for his brother, Noel, Jr., who was then in the Armed Services of his country.

The court was much impressed with the appearance of these upstanding young men while tes-

tifying, as was also the case in the instance of the parents who preceded them, who have been respected citizens of Chouteau County for many years. After all it's what you believe, as the court remarked during the trial, and now upon a consideration of all the evidence, the court has thus far been unable to find fault in the testimony of members of this family or in their manner of giving it, and finds corroboration in respect to labor they performed in furtherance of their claim of formation of partnership for 1945. It would seem from the evidence that the "farm chores," mentioned by counsel for defendant, were well done by all members of the partnership. As it appears to the court the partnership involved extensive wheat operations of such an extent as to require the attention and constant services of the members of the partnership, and hired help in addition, so that it was in no sense merely a matter involving so-called "farm chores."

Grave account is made of the fact that transactions are found to have been conducted in the name of A. E. Anderson & Son, A. E. Anderson, Noel Anderson, Agnes Anderson, instead of in the name of Noel Anderson and Sons in 1945. What does the record show? Importantly it shows the defendant admits good faith on the part of the Anderson family "to create a partnership at some future time." If good faith is admitted, after hearing the testimony of the Anderson family, and all members thereof declare, and established from their partnership records and other sources, that the partnership was to become effective and was in operation during

the year 1945, how can the admission of good faith be consistenty reconciled with a rejection of the evidence on the subject of time when the partnership was established and in operation? The court believes from the testimony of the Andersons and others living in their neighborhood, and from the records of the partnership, that good faith and honesty of purpose has been disclosed, and that it would be difficult for one with an open mind to note the appearance of those witnesses on the stand and their manner of testifying without being impressed with their sincerity, and at the same time taking into account any self interest they might have in the result.

It appears from the testimony of members of the Anderson family that the new partnership was discussed and planned in April, 1944, and a final council was held in December, during Christmas week of that year, in which the plan was consummated with Noel, Agnes and Robert M. Anderson taking part in the agreement, which was subsequently, in January, 1945, ratified by Noel J. Anderson. The evidence goes into detail as to the interests of each member of the family in the partnership; it is not necessary to repeat it here, all agreed and were satisfied with their respective shares in the partnership, and the evidence is convincing as to the substantial contributions of each member of the family to the partnership.

On the subject of taxes for 1945 and 1946 it appears that taxes on the partnership property were assessed and paid in the name of A. E. Anderson

and Son, since all the property stood in the name of A. E. Anderson, his estate still being in process of administration, but from Exhibit 9-E it also appears that taxes for 1945 were charged to the partnership expense of Noel Anderson & Sons; and the sale of wheat for 1945 amounting to $28,159.81 is also credited in the account of that partnership. Payments to Mrs. Aleta P. Anderson and Mrs. Finney for their shares in the ranch property from the joint account of Noel and Agnes Anderson would seem to indicate a contribution from each to the new partnership, and the books of the new partnership furnish proof that it was in operation during the year 1945.

Several authorities cited by counsel unquestionably support the position taken by the court on the facts presented in this case. Probably the leading decision on the subject of family partnerships is found in the case of Commissioner vs. Culbertson, 337 U.S. 733, and on reading this decision, one is bound to be impressed with its close application to the situation here; it was held there, with other expressions of like tenor: "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts —the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the

purposes for which it was used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise * * *. If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient."

For the purpose of carrying on the business of farming, ranching and raising livestock, in which the members of the Anderson family had been engaged for many years, Noel Anderson, his wife and two sons joined together their possessions and labor to continue their life work wherein they were to share in a community of interest of all profits and losses to the extent of their respective holdings in the partnership, thus following a well established precedent in the Anderson family.

Reliance has been placed by defendant upon the decision of our Circuit Court of Appeals in the Harkness case (Harkness vs. Commissioner, 193 Fed. (2) 656), by Circuit Judge Pope wherein the question raised was whether there had been established a valid family partnership for tax purposes by a husband and wife and their two children for the year 1943. The errors alleged by the petitioners related largely to an alleged failure of the tax court to find facts concerning their acts and conduct for the years 1944 to 1947. The Tax Court held

that neither the son nor the daughter were present during the year in question and therefore not able to assist in the management of the business until after 1943, nor until 1946; that this would be the case was contemplated when the articles of partnership were drawn and signed in December, 1942, although they recited that the partnership composed of Harkness, Sr., his wife and two children, should commence January 1st, 1943.

The facts in the case above noted are entirely different in the instant case; here the work in furthering the interests of the partnership commenced in 1944, following the discussion of the plan for such purpose in April of that year, which was fully consummated in December of the same year; during that year the sons, Robert M. and Noel J., took charge of farming and ranching operations and care of the livestock, and sowed eleven hundred acres to grain for the year 1945, and in 1945, Robert, when his brother was absent in the Army, performed the same work and again sowed the grain in 1945 for the year 1946, and the wife of Noel Anderson, Sr., helped in different ways in both years in carrying on farming and ranching operations; she supervised cooking and other household duties for the family and hired help, drove tractor and hauled grain, and none of the family drew any wages for such services, and it all applied on the partnership interests, and like conditions existed and work of the partnership progressed during the years 1946, 1947 and henceforth to date of trial. During the years 1944 and 1945, Noel An-

derson, Sr., was not in good health but he assisted in advising and over-seeing the work of his sons. Operations were carried on during 1945 according to the plan agreed upon in forming the partnership, and it has continued ever since as above noted.

The petitioners in the Harkness case contended that happenings subsequent to the year in question should be considered in determining the issue of good faith and intent, and that would seem to be necessary in this case in view of the work performed by the members of the partnership during the years 1944 and 1945, which finds corroboration in the testimony of their neighbors.

Another contention of the Tax Court in the Harkness case was that there could be no valid partnership within the meaning of the tax laws for the reason that the children were not there in 1943 and therefore could not contribute "original capital" or "vital services," and that it was not contemplated they would do so; an entirely different state of facts existed there than is found in the Anderson case in that respect. As Judge Pope said in referring to the Culbertson case "the Supreme Court itself three times mentioned the contribution of capital and services as some of the circumstances to be taken into consideration in arriving at the question of bona fide intent." It might be said here that there would have been no income or profits for the years 1945 and 1946 had it not been for the services rendered by the four partners as above outlined.

It was said in the Harkness case: "But the crucial question was whether the new arrangement

was really and truly to begin at once, or at some future date, when the desired help of the young men would become available." There was no question of availability of help by the young men in the Anderson case—both were available to pave the way for the income and profits for 1945, and Robert carried the burden for himself and his brother in 1945 for the income and profits for 1946.

Other authorities could be cited sustaining the views of the court herein, but enough seems to have been said to justify the court in this case in finding for the plaintiffs, and accordingly such is the decision of the court herein. Findings of fact and conclusions of law, and form of judgment may be submitted. Exceptions allowed counsel.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 20, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 1306

This cause duly came on for trial without a jury on December 11, 1952. Plaintiff appeared herein in person and by his attorney and defendant appeared herein by his attorneys. Evidence was introduced by the parties hereto and briefs having been submitted under the order of the Court and the Court

having taken the same under advisement, now, upon consideration of the testimony, the stipulation of the parties, and the exhibits introduced in evidence and pursuant to the Federal Rules of Civil Procedure, the Court finds the facts specially and states its conclusions of law thereon with direction for entry of the appropriate judgment as set forth below:

Findings of Fact

1. That the formation of a family partnership for the purpose of conducting farming, ranching and livestock operations in Chouteau County, Montana, was discussed and planned by members of the plaintiff's family in the month of April, 1944. That the plan was consummated at a family council held during the latter part of December, 1944, at which time Noel Anderson and his wife, Agnes Anderson, and a son, Robert M. Anderson, made an agreement which was subsequently, namely in the month of January, 1945, ratified by Noel J. Anderson, another son. That said agreement provided for the interest and shares of each member of the partnership. That the said Noel Anderson, Agnes Anderson, Robert M. Anderson and Noel J. Anderson each made substantial contributions to said partnership during the time involved in this action. That Robert M. Anderson and Noel J. Anderson prepared the soil and put in the crops in 1944 for the 1945 crop. That Agnes Anderson supervised the cooking for hired help, drove a tractor and hauled grain during the year 1945 and that Noel Anderson, who was in poor health at the time, assisted in advising and over-

seeing the work of his sons. That the farming and ranching operations during the year 1944 and during the entire year of 1945 were carried on by said partnership in good faith and have so continued ever since.

2. That a partnership income tax return for the year 1945 was filed in January of 1946 in the name of Noel Anderson and Sons setting forth the share of the net earnings of Noel Anderson, Agnes Anderson, Noel J. Anderson, and Robert M. Anderson in said partnership and each member of the said partnership filed individual income tax returns for said year which returns were later audited by the Bureau of Internal Revenue and as a result of said audit the partnership was, by the said Bureau, held invalid for tax purposes and the income tax on the entire earnings of said partnership for the year 1945 were assessed to the Plaintiff. That the defendant herein thereupon called upon the plaintiff to pay an additional tax of $10,292.84 which amount was paid by the plaintiff to the defendant on November 10, 1949.

3. That a claim for refund for said amount so paid was duly and timely filed by the plaintiff in the office of the defendant as Collector of Internal Revenue at Helena, Montana. That said claim for refund was rejected by the Commissioner of Internal Revenue on April 14, 1950.

Conclusions of Law

The Court concludes:

1. That this Court has jurisdiction of this cause and of the parties thereto under the express authority contained in Title 28 U.S.C., Section 1340 and Section 3772(a)(1) and (2) of the Internal Revenue Code.

2. That the plaintiff, Noel Anderson, Agnes Anderson, Noel J. Anderson and Robert M. Anderson joined together as partners in good faith in the months of December of 1944 and January of 1945 for the purpose of conducting a farming, ranching and livestock business in Chouteau County, Montana. That said partnership conducted said operations during the entire year of 1945 and that each of the members of said partnership shared in said operations and the profits thereof.

3. That the sum of $10,292.84 was erroneously and illegally collected from the plaintiff by the defendant on November 10, 1949.

4. That the plaintiff, Noel Anderson, is entitled to judgment against the defendant, Thomas M. Robinson, Collector (now Director) of Internal Revenue for the District of Montana, for the sum of $10,292.84 with interest thereon at the rate of six per cent per annum from November 10, 1949.

Dated June 30, 1953.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed June 30, 1953.

District Court of the United States for the District of Montana

Civil No. 1306

NOEL ANDERSON,

Plaintiff,

vs.

THOMAS M. ROBINSON, Collector of United States Internal Revenue for the District of Montana, at Helena, Montana,

Defendant.

JUDGMENT

This cause came on regularly for trial on the 11th day of December, 1952, Vernon E. Lewis appearing as counsel for plaintiff and William H. Bowen, Special Assistant to the Attorney General, and Emmett C. Angland, Assistant United States Attorney, appearing for the defendant. The cause was tried before the Court without a jury whereupon witnesses upon the part of the plaintiff and defendant were duly sworn and examined and documentary evidence introduced by the respective parties; and the evidence being closed, the cause was submitted to the Court for consideration and decision, and, after due deliberation thereon, the Court having filed its decision, now files its Findings of Fact and Conclusions of Law in writing, and orders that Judgment be entered herein in favor of plaintiff in accordance therewith.

Wherefore, by reason of the law and the findings

aforesaid, It Is Ordered, Adjudged and Decreed, that Noel Anderson, the plaintiff, do have and recover of and from Thomas M. Robinson, Collector (now Director) of Internal Revenue for the District of Montana, the sum of Ten Thousand Two Hundred Ninety-two and 84/100 Dollars ($10,292.84) with interest thereon at the rate of six per cent per annum from November 10, 1949, amounting to the sum of $2,247.23, together with interest thereon at the rate of six per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action amounting to the sum of Four Hundred Forty-four and 31/100 Dollars ($444.31).

Dated June 30, 1953.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered June 30, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the defendant above named, Thomas M. Robinson, Collector of United States Internal Revenue for the District of Montana, at Helena Montana, hereby appeals to the Court of Appeals for the Ninth Circuit from that certain final Judgment entered in this action on the 30th day of June, 1953, which is in favor of the

plaintiff, Noel Anderson, and from the whole of said Judgment.

Dated August 26, 1953.

/s/ KREST CYR,
United States Attorney for
the District of Montana.

[Endorsed]: Filed August 27, 1953.

[Title of District Court and Cause.]

DOCKET ENTRY RE NOTICE OF APPEAL

Aug. 27, 1953. Filed Defendant's Notice of Appeal; Mailed copy Notice of Appeal to Plaintiff's counsel.

Attest, A True Copy:

[Seal] H. H. WALKER,
Clerk;
By /s/ SUSAN L. ROSMAN,
Deputy.

[Title of District Court and Cause.]

ORDER FOR TRANSMITTAL FOR ORIGINAL EXHIBITS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On motion of the United States Attorney,

It Is Ordered that the Clerk of the United States District Court for Montana transmit the original

exhibits introduced at the trial of this cause to the United States Court of Appeals for the Ninth Circuit as a part of the record on appeal herein.

Dated this 19th day of November, 1953.

/s/ CHARLES N. PRAY,
United States District Judge.

[Endorsed]: Filed and entered November 19, 1953.

In the District Court of the United States, in and for the District of Montana, Great Falls Division

Civil No. 1306

NOEL ANDERSON,

Plaintiff,

vs.

THOMAS M. ROBINSON, Collector of Internal Revenue for the District of Montana, at Helena, Montana,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: Honorable Charles N. Pray,
United States District Judge.

For Plaintiff:
VERNON LEWIS,
Attorney at Law.

For Defendant:

WILLIAM H. BOWEN,
Special Assistant to the Attorney General;

EMMETT C. ANGLAND,
Assistant United States Attorney.

The above-entitled cause came on regularly for hearing in the District Court of the United States, in and for the District of Montana, Great Falls Division, in the Federal Post Office Building at Great Falls, Montana, on December 11, 12, and 13, 1952, before the Honorable Charles N. Pray, Judge Presiding, without a jury;

Whereupon, the following proceedings were had and done, to wit:

The Court: Gentlemen, are you ready to proceed with this case set for trial?

Mr. Lewis: Plaintiff is ready.

Mr. Angland: The defendant is ready. Now at this time, may it please the court, I would like to move the admission of William H. Bowen, Special Assistant to the Attorney General, as one of counsel for the defendant in this case.

The Court: In this case?

Mr. Angland: Yes, your Honor.

The Court: Very well, he may be admitted for that purpose and you may proceed with your case, Mr. Lewis.

Mr. Angland: Would the court like some statement as to the nature of this case before we proceed with evidence?

The Court: I think we both understand what it

is about; this is one of these family partnerships we have heard about all over the United States in the last few months. [7*]

Mr. Lewis: I had thought that a statement was not necessary, if the Court please, because the facts are fairly well set out in the complaint.

Mr. Angland: It isn't necessary; it was just a matter of a suggestion.

The Court: It isn't necessary. We might just as well proceed with the proof right now. I know what the pleadings contain.

Mr. Lewis: Call Mr. Noel Anderson.

NOEL ANDERSON

plaintiff, was called as a witness, and testified as follows, having been first duly sworn:

Direct Examination

By Mr. Lewis:

Q. Will you please state your name?
A. Noel Anderson.
Q. You are the plaintiff in this action?
A. I am.
Q. Where do you reside, Mr. Anderson?
A. Fort Benton, Montana.
Q. And what is your occupation?
A. Rancher.
Q. How long have you been such?
A. All my life.
Q. And do you have your land and farming operations in Chouteau County, Montana? [8]

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Noel Anderson.)

Q. Where are they located in a general way, Mr. Anderson?

A. Approximately 20 miles northeast of Fort Benton.

Q. On which side of the Missouri River?

A. South side of the Missouri River.

Q. And if you were traveling from Fort Benton to your ranch, what way would you take in the summer time?

A. In the summer time we drive to Loma, cross the Missouri river on a ferry, beyond there probably about seven miles east to the ranch.

Q. And your farm lands are then on the banks?

A. Yes.

Q. Are there any river bottom lands involved in this case? A. There are.

Q. What was the name of the river bottom place?

A. It would be the old W. S. Kingsbury ranch.

Q. Commonly known as Bill Kingsbury?

A. That is right.

Q. And that is a part of the land involved in this case, is it? A. That is correct.

Q. Mr. Anderson, when did you start farming on this land in Chouteau County?

A. My father started there and I worked with him in the spring of '17.

Q. His name was A. E. Anderson? [9]

A. That is correct.

Q. He is not living now? A. He is not.

Q. When did he die?

(Testimony of Noel Anderson.)

A. He died on Christmas Eve, '43.

Q. During the time from '17 to the time of your father's death were you engaged in your farm and ranch operations continuously?

A. Except for the time I was in school.

Q. And did you ever have a partnership with your father in this farm and ranch operation?

A. Starting with '35.

Q. And from that time on to the time of your father's death was that partnership then existing?

A. It was.

Q. And operating? A. It was.

Q. When you started what, you and your father there what was the extent of your farming operations, did you own any land?

A. Very little, when we first started it was all leased land.

Q. A good deal of it leased from the state of Montana? A. It was.

Q. And do you still have that land?

A. We do. [10]

Q. Under lease from the state of Montana?

A. Yes.

Q. And did you have very much property or equipment?

A. We had some farming equipment such as it was; obsolete I would call it.

Q. When you came you brought that with you and it was old style farm machinery, I take it?

A. It was.

(Testimony of Noel Anderson.)

Q. Now when you started in did you have very great acreage under cultivation?

A. Well when we started in the land was all virgin land; it had never been broken.

Q. And you built the place up from raw prairie?

A. That is right.

Q. Mr. Anderson, did you and your father file federal income tax returns during the period of that partnership? A. We did.

Q. And do you know about when you filed your first partnership return?

Mr. Angland: Just a minute, your Honor, to which we will object; the partnership existing between A. E. Anderson and Noel Anderson is not in issue in this matter and any partnership existing at that time would not tend to prove or disprove any issue presented in this case. [11]

The Court: Well, it might have some reference on the question of intent; it is certainly laying a foundation, a sort of historical foundation.

Mr. Lewis: That is the purpose of it for showing intent.

The Court: I think it should be allowed on that score.

Q. Mr. Anderson, about when was the first partnership return filed?

A. I am not sure whether it was '35 or '36; it was one of them.

Q. Now were those partnership returns filed in a name, a partnership name? A. They were.

Q. And what was that partnership name?

(Testimony of Noel Anderson.)

A. A. E. Anderson and Son.

Q. Were those partnership returns ever audited by the Bureau of Internal Revenue?

A. They were.

Q. What have you to say about the partnership returns from 1941 on to the death of your father as to when they were audited by the Bureau of Internal Revenue?

A. They were audited; they were checked.

Q. And during this entire period of the partnership in whose name was the property? [12]

A. The property was all in my father's name.

Q. And did it continue in your father's name up until the time of his death? A. It did.

Q. In whose name was the bank account?

A. It was in my father's name.

Q. And did it so continue up until the time of his death? A. It did.

Q. Did you have a right to write checks on that account? A. I did.

Q. State whether or not all of the property of the A. E. Anderson & Son partnership during the entire time was in the name of your father?

A. It was.

Q. And was a lot of the business of the partnership conducted in his name? A. It was.

Q. Now in the audit of these returns, Mr. Anderson, was the partnership of your father and you allowed? A. It was.

Q. Was it ever disallowed? A. It was not.

Q. Now during the time of the old partnership,

(Testimony of Noel Anderson.)

the A. E. Anderson & Son partnership, did you draw money from the partnership from time to time?

A. I did. [13]

Q. And what did you do with that money?

A. That money was for my personal needs.

Q. And did you have a bank account?

A. I did.

Q. What sort of a bank account was it?

A. Up until 1941 it was my personal accout.

Q. And then what happened in '41?

A. It became a joint account.

Q. With whom? A. With my wife.

Q. Agnes Anderson? A. That is correct.

Q. Have you kept that account continuously in the bank since then? A. We have.

Q. Was it in the Chouteau County Bank at Fort Benton? A. That is correct.

Q. And when you drew money from the old partnership, I mean by that A. E. Anderson & Son, was it deposited in the bank usually? A. Yes.

Q. And from the time of the opening of the joint bank account with your wife in December, 1941, were your earnings from the old partnership deposited in that account? A. Yes. [14]

Q. When were you married, Mr. Anderson?

A. July 1st, 1925.

Q. And your wife's name is Agnes Anderson?

A. That is right.

Q. Now where has the family made its home, where did it make its home from the time of your marriage up to the time of, well, the early 40's?

(Testimony of Noel Anderson.)

A. Up until the fall of 1948 we made our home continuously on the ranch.

Q. And during that period the children were born? A. That is right.

Q. And what were the names of your children?

A. Noel Junior Anderson, Robert M. Anderson, Anna Jean Anderson and A. Evonne Anderson.

Q. Noel Junior Anderson, Noel J. Anderson and Robert M. Anderson are involved in the partnership, are they, that is involved in this case?

A. That is right.

Q. Now did those boys grow up on the ranch?

A. They did.

Q. And will you state to the court what parts your wife, Agnes Anderson, and the two boys had in the farming operations on the old partnership through the years and when it occurred? [15]

A. My wife cooked for hired help, the boys helped with the work as soon as they were—I could say that they started work when they were 12 years old doing things that they were capable of doing.

Q. That would be in handling some of the farm machinery?

A. Driving truck, driving tractor.

Q. And did they have anything to do with the cattle? A. Helping move cattle, work cattle.

Q. Did that work continue every year from the time the boys were old enough to operate or to work during the entire life of the A. E. Anderson partnership? A. It did.

(Testimony of Noel Anderson.)

Q. Now were any wages paid the boys?

A. In the latter years of the old partnership they were paid some wages.

Q. And your wife, you say she cooked for men?

A. She did.

Q. Now those were men hired in the partnership operations? A. That is right.

Q. And did she do any other work in the field in the old partnership? A. She did.

Q. What did it consist of? [16]

A. I remember in '42 she assisted in the hay field, drove a pickup truck that is used to pull the stacker.

Q. What have you to say about the, what became of the profits from the partnership in the earlier years?

A. The profits were invested in land, new equipment, and, of course, living expenses.

Q. Was there an increase in the size of the operations during that period?

A. There was.

Q. In land cultivated? A. That is right.

Q. What about the cattle part of the operation?

A. The cattle herd was increased.

Q. What sort of cattle do you grow?

A. We grow Aberdeen Angus cattle.

Q. And has that herd been rather noted through the years for its quality?

A. They are noted as a good commercial Angus herd.

Q. Much has been made of the Kingsbury place,

(Testimony of Noel Anderson.)

Mr. Anderson, did you have any interest in the Kingsbury place when it was purchased?

A. I didn't.

Q. But you did have a half interest in all of the other operations? A. I did.

Q. Is that right? A. Yes. [17]

Q. Now your father died you said in December of 1943; did you continue the operations as the surviving partner for a period after that?

A. I did.

Q. The method of farming perhaps you might tell the court about when you started your farming operations, for instance, for the '44 crop when would the farming operations be started?

A. The farming operations would be started in the spring of '43 for the '44 crop.

Q. And what happens in general in those operations?

A. The land is first plowed or deep turned in some manner and then it is cultivated and kept clean through the summer months.

Q. Now do you grow fall wheat, winter wheat?

A. Yes.

Q. How much of your operations are normally winter wheat?

A. Well, practically all except for a few acres of feed crops, oats or barley.

Q. And when would the crop be seeded for the '44 crop?

A. It would be seeded in September of '43.

Q. Then the crop was in the ground and grow-

(Testimony of Noel Anderson.)

ing, the '44 crop, at the time of your father's death?

A. It was. [18]

Q. So that you continued the old partnership so far as that crop was concerned through the year '44, is that correct? A. That is correct.

Q. Now was an administratrix appointed of your father's estate? A. There was.

Q. In the early part of '44? A. Yes.

Q. And who was that? A. My mother.

Q. And who was that? A. Aleta Anderson.

Q. And that estate was in the process of probate for some time? A. It was.

Q. How long?

A. The first decree was issued August 19th, 1946.

Q. And during that time the question of the federal estate tax was involved? A. It was.

Q. And you are familiar, are you, with all of the affairs in connection with the estate, are you?

A. Quite familiar.

Q. You knew of the filing of the federal estate tax return? A. Yes. [19]

Q. In fact you went over it with your mother and her attorney? A. That is right.

Q. Now was that return audited?

A. It was.

Q. And in that return you followed the inventory in the estate pretty well, did you? A. We did.

Q. Now when the inventory in the estate was filed you have already testified that all of the land was in your father's name? A. That is right.

Q. But you claimed ½ of everything except the

(Testimony of Noel Anderson.)

Kingsbury place? A. I did.

Q. And the apprasial was made on that basis?

A. It was.

Q. And the federal return, federal estate tax return was made on that basis? A. It was.

Q. Did you know of the audit of the federal estate tax return? A. Yes.

Q. Was it accepted by the Government?

A. It was. [20]

Q. As turned in with the possible exception of an adjustment for a small error?

A. There was a small adjustment.

Q. But so far as the ownership of the property was concerned and the part that the A. E. Anderson estate owned and the part that you owned that was accepted by the Bureau of Internal Revenue?

A. It was.

Q. And it has never been questioned?

A. Never has.

Q. Now, Mr. Anderson, what did you do with reference to the money that was in the old partnership after your father's death, was there any change in the account?

A. That account became an estate account; it was in my father's name and it became an estate account.

Q. Now was there another account opened?

A. There was.

Q. When? A. I believe in January of '44.

Q. You were then operating as the old partnership? A. We were.

(Testimony of Noel Anderson.)

Q. And you didn't have any bank account?

A. No.

Q. And what did you do?

A. I opened an account in the name of A. E. Anderson and Son. [21]

Q. Where?

A. In the Chouteau County Bank, Fort Benton.

Q. Now what was the custom with reference to the sale of the wheat through the years, how did you handle that?

A. Well the wheat was sold and deposited to the partnership account.

Q. Was there any wheat ever held over from one year to another?

A. Yes, that has been common practice.

Q. Did you have large granary space on the farm? A. We did.

Q. And was the amount of wheat held over at various times quite a substantial amount?

A. It was.

Q. Now did you sell any of the old partnership wheat in the year '44? A. I did.

Q. Where was the money placed from that?

A. It was placed in this new account.

Q. And was there any start made in the business relations for change in ownership or change in operations during the year '44 so far as your accounts were concerned? A. No. [22]

Q. Directing your attention to the preparation for the '45 crop, who worked in the preparation of that crop?

(Testimony of Noel Anderson.)

A. We had a hired man at that time and our two sons worked on the ranch.

Q. And what have you to say as to the share of the farm work that compared to what you did that the boys did during the years say from '43 on, including '44?

A. When they were there they took my part of the heavy work.

Q. Was there any particular reason for that?

A. Well as I see it there had to be someone to look after these little details, management and I had come to realize that I would have to slow up; I had been advised by a physician to slow up.

Q. How long had the boys been working in the field and doing the farm work say up to the year '44?

A. Well as I have said before, they worked, started when they were 12 years old.

Q. Which was several years before that?

A. That is right.

Q. And had they become well versed in farming methods and handling farm machinery by that time?

A. They had. They were very diligent; they liked the work and they did the work. [23]

Q. Now what about the preparation of seed bed, the summer fallowing and seeding of the crop for '45 in '44; did the boys have a large part in that?

A. They did.

Q. Were they there all of that year '44?

(Testimony of Noel Anderson.)

A. Noel Jr. entered the Army I think it was September 19th, 1944.

Q. And was he there then any more in '44?

A. He was not.

Q. How long was he in the Army?

A. He was discharged from the Army in January of '46.

Q. He saw active service, did he?

A. He did.

Q. Was he in the hospital before he was discharged?

A. He was wounded on Okinawa in May of '45.

Q. Mr. Anderson, after your father's death during the year '44 or any time during near that period did you ever talk to the boys about taking them into the farming operations? A. In '44?

Q. Well ever mention anything of that kind to them or talk over what their future would be?

A. Nothing definite as far as the partnership was concerned until about Christmas time of '44. [24]

Q. Had any talk occurred between you at any time as to whether they might stay on the farm?

A. That had been discussed many times.

Q. And what was the result of that, what did they decide, if anything?

A. They were determined that they were going to be farmers.

Q. Now did you take any steps during the year '44 to form a new partnership? A. We did.

Q. Did you consult an attorney at that time?

(Testimony of Noel Anderson.)

Mr. Angland: Just a minute, your Honor. We have been rather patient and tolerant, I believe, but I think we are getting to the point where we would ask that counsel not lead and suggest to his witness to quite the extent that he has been leading and suggesting the answers to the witness up to this point. We are coming to some rather important evidence.

Mr. Lewis: If the court please, I realize that and when we are trying a case to the court I haven't been quite as careful as I might otherwise be.

The Court: Well can you lay your foundation here so we will get rapidly through it. We have accomplished something in point of time in not following the rules as closely as we should, [25] perhaps.

Q. Mr. Anderson, did you consult your attorney at any time during that year? A. I did.

Q. And who was it?

A. Mr. Lewis. Yourself.

Q. Your attorney now? A. Yes.

Q. What was the purpose of the consultation?

A. I was seeking advice as to the legal aspects of forming a new partnership.

The Court: I didn't get that first word, "forming a"?

Mr. Lewis: Forming a family partnership.

Q. And did we talk over more or less details or not? A. We did.

Q. Did you outline anything about what you had in mind with reference to the partnership?

Mr. Angland: Now, your Honor—just a minute,

(Testimony of Noel Anderson.)

Mr. Anderson. This is the point I called the court's attention to a moment ago. I note Mr. Lewis is still leading and suggesting the answers to his witness. I think at this point it is only fair they should be more restricted in the nature of the questions rather than having him lead the witness at this time. He is getting at what we might term the crux of the case; at least it has more force and effect, the evidence at this time. [26]

The Court: If you want to hurry along I suppose you can resort to the old-time question of whether or not, state whether or not.

Q. Will you state, Mr. Anderson, whether or not the question of somewhat what you had in mind was outlined by you to your attorney?

A. It was.

Q. And did you get into the question of who was to be in the partnership or not? A. We did.

Q. State whether or not you talked about what property was going into the partnership?

A. We did.

Q. And was there any paper worked out as to the shares at that time, if you recall?

A. We did some figuring or estimating on the property that would go into the new partnership.

Q. I hand you Plaintiff's proposed Exhibit No. 1 and ask you if you recognize that sheet of paper?

A. I do.

Q. Do you know in whose handwriting it is?

A. I believe it is in your handwriting.

Q. And was that paper drawn up, the notations

(Testimony of Noel Anderson.)

thereon at the time that you consulted with me?

A. They were.

Mr. Angland: May I inquire of Mr. Anderson?

Mr. Lewis: Sure. [27]

Q. (By Mr. Angland): Mr. Anderson, at the time that you are testifying concerning it is some date in '44, is that right?

A. You mean when we had this consultation?

Q. Yes.

A. It was in October, I believe, of '44.

Q. You think it was October of '44?

A. It was.

Q. Had you at that time settled with your mother and your sister for the purchase of their interests in the estate?

A. I had not. The agreement had been made but no settlement had been made.

Q. Did the paper Mr. Lewis has handed you and what has been identified as Plaintiff's Exhibit No. 1 have relation to the estate matters and the valuations that you might place on the entire property so that you might purchase your mother's interest and your sister's interest?

A. The valuations on this paper were taken from the inventory and appraisement of the estate.

Q. Of the A. E. Anderson estate?

A. A. E. Anderson estate.

Q. Then you were not including in this then the property that you owned as a partner in the A. E. Anderson estate? A. Yes. [28]

(Testimony of Noel Anderson.)

Q. But you were not including in it your property in the partnership of A. E. Anderson & Son.

A. Will you state that again, please.

Q. Well possibly I can make myself clearer, Mr. Anderson. That is what I want to do. You were a partner in the A. E. Anderson and Son partnership and you were also an heir to a one-third interest in the A. E. Anderson estate?

A. That is right.

Q. In arriving at these figures what I am getting at is were you at the time considering the purchase of your mother's interest and your sister's interest in arriving at the valuations here? Is that the proposition that you were working on when you were working out a valuation so that you might determine what you might pay your sister and what you might pay your mother for their interest in the estate property?

A. The property had already been appraised and this sheet was worked up.

Q. One-half of the property had been appraised, is that it? A. Yes.

Q. One-half of the A. E. Anderson & Son property had been appraised? A. Yes.

Q. Yes, that is what I am getting at, a one-half interest takes on a different value than the whole; you don't necessarily pay the same for a one-half interest; [29] it might not be a value equal to one-half of the whole, you know what I mean by that?

A. I understand what you are getting at.

Q. Your father's estate might not be appraised

(Testimony of Noel Anderson.)

at a full one-half of the whole value because it becomes an undivided one-half with you as the owner of one-half interest. Now I am trying to find out whether or not this actually had to do with the purchase of your mother's interest and your sister's interest in the estate, in the A. E. Anderson estate at the time you were talking with Mr. Lewis in '44?

A. The agreement had been made with my mother and sister and this sheet included all the property that was to be taken over by the new partnership and operated.

Q. This included all of it? A. All of it.

Q. It included the appraisal of your father's estate covering everything that it was contemplated you would take over when you would take over the whole thing? A. That is right.

Q. That is right. Now, what is there, Mr. Anderson, about this particular sheet that you recall as being a sheet or paper, Plaintiff's proposed Exhibit No. 1, as being the sheet or paper that was prepared when you were talking with Mr. Lewis about this matter in '44? Is there anything about the sheet of paper that reminds you that [30] it was prepared at that time or is it a fact that Mr. Lewis handed it to you as the sheet that he says was prepared then?

A. As I remember it is the sheet that was prepared at that time.

Q. And is there anything about it?

(Testimony of Noel Anderson.)

A. The figures, the valuations and the property, the things that were set down here.

Q. That is a memorandum that Mr. Lewis prepared while you were in his office talking to him?

A. That is right.

Q. And it appears to contain the same information that you and he discussed?

A. That is right.

Q. Is that what there is about it that you recall?

A. Yes.

Q. You don't know where it has been since that time?

A. I presume it has been in Mr. Lewis' office in his files with other papers.

Mr. Angland: Well we don't like to be technical about the matter, your Honor, but I think it is objectionable at this time; unless you have further identification we will object to the introduction of the exhibit.

The Court: You have been talking about a paper; what does it contain; what is it about? [31]

Mr. Lewis: I haven't offered it yet, your Honor, and am willing to go further.

The Court: Oh, you are going further?

Mr. Lewis: Now in view of the inquiry of Mr. Angland I think I should ask two or three questions before I offer it.

Q. (By Mr. Lewis): Now, Mr. Anderson, you have some items on the left on here? A. Yes.

Q. Now the first item, $7,460.75, that is what?

A. I believe that would be the Kingsbury place.

(Testimony of Noel Anderson.)

Q. And that was entirely owned by your father as has already been testified to? A. It was.

Q. But it was included, of course, with the other property of the estate in the deal that you had arranged with your mother and sister?

A. That is right.

Q. Now the other real estate is the entire value of $12,950 of the partnership real estate?

A. Yes.

Q. And would that be true of the farm machinery, the entire value? A. Yes.

Q. And also with the cattle? A. Yes. [32]

Q. And you have already stated, have you, that these amounts were arrived at from the inventory and appraisal filed in your father's estate?

A. That is correct.

Q. But, of course, these were charged and doubled in certain instances?

A. That is right.

Mr. Lewis: Now if the court please, we offer Plaintiff's proposed exhibit No. 1 in evidence.

Mr. Angland: To which the defendant objects, your honor; it does not appear to be a memorandum prepared by this witness and does not appear to have been in his handwriting, rather it is in the handwriting of his attorney according to his evidence, so there is no foundation to establish that he is a handwriting expert. There is no date on which the document was prepared; the time I believe was the 1st of October of '44. Apparently it is offered to prove the truth of the matter stated

(Testimony of Noel Anderson.)

therein. It seems to me that the person who prepared the memorandum should probably identify it and show what the circumstances were and when it was prepared and where it has been since then.

The Court: Well in view of all the proof that has been taken in respect to the proposed Exhibit 1 it may prove to be material and of some value as evidence. Of course, I can't anticipate everything that will be introduced at this time but I think I will allow it to be [33] introduced in evidence. I think it has been sufficiently identified as to place, time and circumstances and persons. It may be received in evidence. Proceed.

Q. (By Mr. Lewis): Now, Mr. Anderson, did you or did you not take further steps with reference to formation of a new partnership?

A. During the Christmas holidays of '45 or '44 our son, Robert, was home, and my wife and I and Robert discussed the formation of the new partnership.

Q. Was any agreement made at that time, verbal agreement? A. There was.

Q. Will you state to the court in substance what it was?

A. The agreement was that a 1/6 working interest in the new partnership would be sold to each of the boys; they were to be charged with 1/6 of the value of the property involved, and my wife was to be a partner with 1/3 interest, and I was to be a partner with 1/3 interest.

Q. Now did the three of you agree to that ar-

(Testimony of Noel Anderson.)

rangement at that time? A. We did.

Q. And what was the partnership formed for?

A. It was formed for the purpose of carrying on the operations of the ranch. [34]

Q. Did you or did you not arrive at a valuation of the property that was to be turned in to the partnership? A. We had.

Q. And was that the property, Mr. Anderson, listed on Plaintiff's Exhibit 1? A. It was.

Q. And the valuation, the figure of $45,000 shown there, Mr. Anderson, was that the figure that you based as the value of the partnership when you started out? A. That is the figure.

Q. And 1/6th of that amount would be what?

A. $7,500.00.

Q. And was that the amount that the boys were to pay for their share? A. That is right.

Q. Now the property that you were turning in to the partnership did Mrs. Anderson have any share in that? A. She did.

Q. What was her share? A. 1/3rd.

Q. Well, I mean before?

A. Before the partnership?

Q. Yes. A. 1/2 interest.

Q. And you stated that you had made an agreement with your sister and your mother to purchase their interests in the A. E. Anderson property? [35]

A. That is right.

Q. Before this occurred?

A. That is right.

Q. Now who were the heirs of A. E. Anderson?

(Testimony of Noel Anderson.)

A. My mother, my sister and myself.

Q. You were the sole heirs? A. Yes.

Q. So you inherited a ⅓rd interest in the estate?

A. That is right.

Q. And your sister ⅓rd?

A. That is right.

Q. And your mother ⅓rd?

A. That is right.

Q. Now did you close the deal with your mother and sister at that time?

A. The deal was not closed at that time.

Q. Why wasn't it?

A. Because a lot of these things hanged on the settlement of my father's estate and the agreement was that they would share in the profits of the old partnership for '44.

Q. The matter of the estate tax was coming along and awaiting determination?

A. It was. [36]

Q. And other matters that kept the estate open until the time that you have already testified to as being in August of '46, is that correct?

A. That is right.

Q. Well by the spring of '46 state whether or not you had your affairs in shape to close the deal with your mother and sister, that is, pay them the money?

A. Things were shaping up so it appeared that the estate would soon be distributed.

Q. And did you pay your mother the agreed

(Testimony of Noel Anderson.)

price and secure a deed from her about that time?

A. I did.

Q. I hand you Plaintiff's proposed Exhibit 2 and ask you if you recognize it? A. I do.

Q. What is that?

A. That is a check I gave to my mother for her interest in the distributed interest in the estate.

Q. In the estate? A. Yes.

Q. With the exception of what?

A. Exception of cash.

Q. Now did you receive anything in return from your mother at that time?

A. I received a deed. [37]

Q. On what account was Plaintiff's proposed exhibit 2 drawn?

A. It was drawn on my wife's and my personal account, joint account.

Q. Joint account? A. Yes.

Q. Did your wife own an undivided half interest in the account at that time? A. She did.

Q. I hand you Plaintiff's proposed Exhibit No. 5 and ask you to examine it, and state what it is if you know?

A. It is a deed conveying my mother's distributive interest from my father's estate to me.

Mr. Lewis: We offer in evidence Plaintiff's proposed exhibit 2 and exhibit 5.

The Court: Exhibits 2 and 5.

Mr. Angland: No objection.

The Court: They may be admitted in evidence.

Mr. Lewis: At this time, if the court please, I

(Testimony of Noel Anderson.)

wonder if we might agree that where we are introducing original exhibits in the case that copies may be substituted afterwards?

Mr. Angland: Yes.

The Court: I think the other side is just as anxious to do that? [38]

Mr. Angland: Yes, we are, and either side—we would qualify that some that either side may withdraw the original for the purpose of making copies, photostatic or otherwise, so that the copies may be substituted for the original. In some instances it may become necessary to withdraw the exhibit to make a photostatic copy; is that agreeable?

Mr. Lewis: That is agreeable.

The Court: Very well.

Mr. Lewis: It so happens I have certified copies which may be substituted later.

Q. (By Mr. Lewis): Now, Mr. Anderson, I hand you Plaintiff's proposed Exhibit 3 and Plaintiff's proposed Exhibit 4 and ask you to examine them. Plaintiff's proposed Exhibit 3 is what?

A. Is a check to my sister, Mrs. Walter Finney.

Q. Is that the same person as Selma Finney?

A. That is right.

Q. On what bank or on what account was Plaintiff's Exhibit 3 drawn?

A. It was drawn on my wife's and my joint account.

Q. I hand you Plaintiff's proposed Exhibit No. 6 and ask you if you recognize it? A. I do.

(Testimony of Noel Anderson.)

Q. What is that, if you know?

A. It is a bank statement for the month of June for [39] the account of Noel or Agnes Anderson.

Q. And it is the original statement that you received from the bank? A. It is.

Q. I hand you now and I will ask you to examine Plaintiff's proposed Exhibit 4 and state what that is?

A. That is a check for $5,000.00 to my sister, Mrs. Walter Finney.

Q. And on what account was that drawn?

A. On the account of Noel Anderson & Sons.

Q. Why were there two checks given?

A. At the time there wasn't sufficient money in our personal account to make these payments.

Q. And did that $5,000.00 check there constitute a withdrawal by you and your wife from profits of the new partnership, Noel Anderson & Sons?

A. It did.

Q. The addition of the two checks, Mr. Anderson, what does that represent then?

A. It represents the amount I paid to my sister for her distributive interest in my father's estate.

Q. And did you receive anything in return for that? A. I did.

Q. I hand you Plaintiff's proposed Exhibit No. 7. Will you please examine it? Do you recognize it? A. I do. [40]

Q. What is it?

A. It is a deed conveying my sister's distributive interest in the estate of my father to me.

(Testimony of Noel Anderson.)

Q. Now was this deed and the other deed that has already been introduced in evidence a consummation of the agreement that was made in '44?

A. That is right.

Q. Between you and your mother and your sister? A. That is right.

Mr. Lewis: We offer in evidence Plaintiff's proposed Exhibits 3, 4, 6 and 7.

Mr. Angland: No objection to any of the exhibits.

The Court: They may be received in evidence.

Q. Mr. Anderson, Plaintiff's Exhibit 6, the bank statement, are the two checks, Plaintiff's Exhibit 2 to Aleta P. Anderson and Plaintiff's Exhibit 3 to Mrs. Walter Finney, charged against the account on that statement? A. They are.

Q. Calling your attention again to Plaintiff's Exhibit 4, Mr. Anderson, do you know whether or not that $5,000.00 was charged on the books, on the partnership books of Noel Anderson and Son against you and your wife, Agnes Anderson?

A. It has been charged.

The Court: We will take a 5-minute recess.

(11:10 a.m.) [41]

Court resumed, pursuant to recess, at 11:25 a.m. at which time counsel were present.

NOEL ANDERSON

resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Lewis:

Q. Mr. Anderson, I hand you Plaintiff's proposed Exhibit No. 8 and ask you if you recognize it?

A. I do.

Q. Will you look at the signature and the seal on the other side? What is that instrument?

A. That is the Decree of Distribution in the estate of my father.

Q. And this is a certified copy of the original, is it? A. Yes.

Q. And this decree includes all of your father's interest in the partnership? A. That is right.

Q. In the A. E. Anderson & Son partnership?

A. That is right.

Q. It includes the entire interest in the Billy Kingsbury land? A. It does.

Q. And it includes somewhat other items that are not involved in the case?

A. That is right. [42]

Mr. Lewis: We offer in evidence Plaintiff's proposed Exhibit No. 8.

The Court: Any objection?

Mr. Angland: No, your Honor.

The Court: It may be received in evidence.

Q. Now, Mr. Anderson, getting back to the formation of the partnership of Noel Anderson &

(Testimony of Noel Anderson.)

Sons, was Noel Anderson, Junior, or Noel J. Anderson there at that time of the conference?

A. He was not.

Q. Where was he?

A. He was in Camp Hood, Texas.

Q. In the military service? A. He was.

Q. Did he come home on furlough after that?

A. He did.

Q. When?

A. It was sometime in the latter part of January.

Q. And was anything said to him by you during the time he was home about this partnership?

A. There was.

Q. And what was said or what was the substance of the matter?

A. He was informed of what we had done on the new partnership we had formed and of course he was included.

Q. Did he fully understand what was involved in it at the time? A. He did. [43]

Q. And what was his reaction to the proposal?

A. It was perfectly satisfactory with him; he wanted to come home and farm when he got out of the Army.

Q. Did he tell you then what he wanted to do about the partnership?

A. It was acceptable to him.

Q. Now, Mr. Anderson, how did you keep the accounts of the closing up of the old partnership

(Testimony of Noel Anderson.)

for '44, for instance, after your father died, and the accounts of the new partnership?

A. I kept a farm account book.

Q. And in that farm account book what was entered? I mean not the specific items but what did you enter in there in general?

A. The receipts and expenditures of the partnership.

Q. And are they all in that book?

A. They are.

Q. Now, Mr. Anderson, you I suppose made income tax returns every year? A. We did.

Q. And did you make federal income tax return for the year '44? A. We did.

Q. And how was that made?

A. It was made in the name of A. E. Anderson & Son. [44]

Q. And it was divided up, was it?

A. It was.

Q. And were there individual returns made, individual returns made from that partnership?

A. There were.

Q. And who, what were they?

A. My personal return, my wife's personal return, Noel J. Anderson's return.

Q. No, on what partnership?

A. The old partnership?

Q. Yes.

A. Noel Anderson and A. E. Anderson Estate.

Q. Now, was there an item of wheat that had

(Testimony of Noel Anderson.)

been carried over shown in the previous year belonging to the old partnership?

A. You are referring to what year now?

Q. Well that was a part of '44 but carried over into '45, is that correct? A. Yes.

Q. And during this period, Mr. Anderson, you had to keep track of the estate affairs and the old partnership? A. Yes.

Q. And the new partnership, did you?

A. Yes.

Q. Did you carry on separate cash accounts for each one? [45]

A. There was an A. E. Anderson & Son account and the partnership business was conducted through that account.

Q. And that was a bank account you refer to?

A. Yes.

Q. When was that account opened, Mr. Anderson? A. In January of '44, I believe.

Q. Now how long was it continued?

A. The A. E. Anderson and Son Account?

Q. Yes.

A. It was continued until May 1st, I believe, '46.

Q. And did you have any other business bank account during that period? A. No.

Q. Then so far as '44 is concerned then in general the entries and checks that were written on that account had to do with the A. E. Anderson & Son partnership, the final year of that partnership?

A. That is right.

Q. Now, then, when you came into '45 and you

(Testimony of Noel Anderson.)

formed a new partnership did you start business under the new partnership right away in '45?

A. As far as the operation of the ranch was concerned we did.

Q. And did you, did the new partnership take over the growing crop that had been seeded by the boys in '44? A. It did. [46]

Q. And that crop was harvested in '45, was it?

A. It was.

Q. Now during the year from September of '44 to the spring of '45 where was Robert Anderson?

A. He was at Montana State College.

Q. Attending school?

A. Attending school.

Q. Did he come back during, after the school year was over? A. He did.

Q. What happened?

A. He immediately went to work on the farm.

Q. And how long did that work continue?

A. He worked until he went back to college about the first of October.

Q. Then he had assisted, had he, in planting the '45 crop, preparing the ground and planting it in '44 with his brother, Noel J.? A. Yes.

Q. And he was there and took part in all of the farming operations during the year '45, up until the time he went to school? A. He was there.

Q. He worked? A. He did. [47]

Q. In the harvest and any other work in preparation of the ground, summer fallowing of the ground for '46? A. That is right.

(Testimony of Noel Anderson.)

Q. And did he return to school in the fall of '45? A. He did.

Q. Before he returned to school what about the crop?

A. The farm work was all done and the crop was seeded, harvesting was done, all the farm work was done.

Q. Did he return to the farm any time before the school year was out?

A. I remember in May of '45 he came home and we branded, helped us with the branding.

Q. Came home especially for that purpose?

A. He did.

Q. Had he ever helped with the branding before? A. Always.

Q. And Noel J. helped? A. Yes.

Q. Now there was no money on hand I take it in the partnership, the new partnership, Noel Anderson & Son? A. No.

Q. Because here hadn't been any sales, is that right? A. That is right.

Q. Now, did you sell any wheat in the early part of '45 that had been carried over from another year? A. I did. [48]

Q. Where did you enter that item?

A. I entered that item in this account book.

Q. What position has it with reference to the first income for '45? A. It is the first entry.

The Court: Are you introducing the page or the whole book?

Mr. Lewis: That is what we are discussing. We

(Testimony of Noel Anderson.)

will try to eliminate the matters not in issue and we will mark the pages referred to. The whole book will be Exhibit No. 9 and the pages will be 9(a), 9(b) and so forth.

The Court: All right.

Mr. Angland: I think that will be helpful to both the court and counsel.

Q. Now, Mr. Anderson, I hand you Plaintiff's proposed Exhibit No. 9 and direct your attention to page 2 which is identified as No. 9(a). What is on that page; not the items, but what is it?

A. It is a record of the income of the partnership for the year '45.

Q. Now getting back to the first entry, Mr. Anderson?

Mr. Angland: Which partnership?

A. The new partnership, Noel Anderson & Sons.

Q. Yes. And getting back to the first entry, what does that represent?

A. That represents the returns from the sale of ½ of the wheat that was carried over [49] from '44.

Q. Which was what?

A. Which was wheat of the old partnership.

Q. And who owned that half interest in that wheat?

A. I owned ½ interest and A. E. Anderson owned the other half.

Q. Did your wife share any in that?

A. Only that she was; the proceeds went to the joint bank account.

(Testimony of Noel Anderson.)

Q. Now, Mr. Anderson, how did you happen to enter that item from the wheat from the old partnership into the new partnership?

A. Well, I realize now that it shouldn't have been entered that way.

Q. Well, what was your purpose of entering if you have any?

A. It was income of the partnership.

Q. Well did you need any money in the new partnership?

A. Of course we needed money to operate on.

Q. Then it was entered there as a part of the partnership, the new partnership capital?

A. Yes.

Q. At the time it was? A. It was.

Q. In reality a gift on your part to the partnership as far as you were concerned?

Mr. Angland: Just a minute. [50]

Mr. Lewis: I will withdraw that.

Q. Did you make a return of this amount in the partnership of Noel Anderson federal income tax return for '45?

A. There was an amended return made in which this item was reported.

Q. In the first return was it reported as partnership funds in the original return filed?

A. It was.

Q. And what did you do when money came in from the earnings of the partnership in '45, where was it placed?

A. It was deposited in the A. E. Anderson & Son account.

(Testimony of Noel Anderson.)

Q. Did I understand that you used the A. E. Anderson & Son bank account during the year '45 for the Noel Anderson & Sons business?

A. That is correct.

Q. Well, why did you do that?

A. We were going through the transition period at that time; we were in the process of closing up the old partnership, establishing the new partnership and also in closing the estate.

Q. Have you had experience, special training in accounting? A. No, sir. [51]

Q. Was it a simpler way, was it or not, for you to handle it than to handle several accounts?

Mr. Angland: Just a minute. That is objected to, your Honor.

Mr. Lewis: All right.

The Court: Yes, leading and suggestive.

Q. Mr. Anderson, was this partnership account, I mean return, audited? A. For what year?

Q. For '45? A. It was.

Q. And the Bureau of Internal Revenue Agent made some suggestions as to changes?

A. He did.

Q. And what did you do about those changes?

A. An amended return was filed.

Q. Mr. Anderson, you filed an amended return?

A. Yes.

Q. And was this item that you have testified to with reference to that carry-over involved in the amended return and in the report of the agent?

(Testimony of Noel Anderson.)

A. Yes.

Q. And what was done with reference to that?

A. I paid him additional tax.

Q. I call your attention to Plaintiff's Exhibit No. 10 and to that part of it representing your [52] personal return was this item of carry-over wheat then by your agreement charged to your account as far as the tax for '45 was concerned? A. Yes.

Q. And was there another adjustment with reference to the sale of livestock? A. There was.

Q. And after those adjustments were made then according to your computation and the amended return was there an additional tax?

A. There was.

Q. And did you pay that tax, Mr. Anderson?

A. I did.

Q. And I hand you Plaintiff's proposed Exhibit No. 11 and ask you to examine it; do you know what that is?

A. That is a check to the Collector of Internal Revenue for $3855.83 in payment of this additional tax.

Q. Primarily covering the item of the carry-over, the wheat? A. That is right.

Mr. Lewis: We offer in evidence Plaintiff's Exhibit No. 11.

The Court: Any objection?

Mr. Angland: We have no objection to that item. I would suggest, Mr. Lewis, I don't believe, possibly I missed it, I don't believe Mr. Anderson testified as to [53] the amount of the item of carry-over. If

(Testimony of Noel Anderson.)

you are tying the exhibit into the payment of the tax on that specific amount of carry-over, I thought it would make the record clear to show the amount of the carry-over.

Q. (By Mr. Lewis): The amount of carry-over, Mr. Anderson, was what, according to your return?

A. The amount of the carry-over, $11,714.59.

Q. Which was added to your return?

A. Yes.

Q. But had been included in the partnership return, the original partnership return filed for that year? A. That is correct.

Q. And was there another item there of the same type?

A. There was an A.C.A. payment amounting to $352.00.

Q. And was that included in the original return of the partnership for that year? A. It was.

Q. But it was a payment in connection with the old partnership? A. That is right.

Q. Then there was one other adjustment, was there, with reference to livestock, which makes a little difference? A. There was. [54]

Mr. Lewis: If the Court please, when Robert Anderson was going in the military service, I took his deposition; he has now been discharged so we will not need the deposition; it is sealed in the court file and I think there is a deed in there that we might want to use, and Mr. Angland agreed with me that it may be opened to see whether that deed is in there.

Mr. Angland: Yes, it is agreeable.

(Testimony of Noel Anderson.)

The Court: The deposition may be opened.

Mr. Lewis: Now, if the Court please, this deed was marked Plaintiff's Exhibit No. 2 and was attached to the deposition; I would like to have permission to take it from the deposition and have it returned to me. The deposition will not be used.

The Court: Very well, I suppose that is agreeable.

Mr. Angland: Yes, I see no objection to that; since the witness is present here to testify the deposition would only be admissible by way of impeachment at this time so it will probably serve no further purpose in the case.

Q. (By Mr. Lewis). Mr. Anderson, what did you do in your accounts during the year '45 in keeping accounts, what did you do with reference to the new partnership? You have already testified that you had all of the accounts in Plaintiff's proposed Exhibit No. 9, is that right? [55]

A. That is right.

Q. Did you have any other book that was used to keep track of the withdrawals of the various members of the partnership and the charges against the various members of the partnership?

A. I did.

The Court: Court will stand in recess until 2:00. (December 11, 1952).

(Court resumed, pursuant to recess, at 2:00 o'clock p.m. at which time counsel and parties were present.)

The Court: You may proceed.

(Testimony of Noel Anderson.)

Mr. Lewis: If it please the Court, we have three witnesses here who are very busy men and it would be a great accommodation to us if we could dispense at this stage with the further examination of Mr. Anderson and to allow these three witnesses to be put on the stand. I have talked with Mr. Angland and Mr. Bowen and they have no objection.

The Court: Very well, under those circumstances you may call your witnesses out of order.

Mr. Lewis: Call Maurice Farrell. [56]

MAURICE FARRELL

was called as witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lewis:

Q. Will you state your name?

A. Maurice Farrell.

Q. Where do you live, Mr. Farrell?

A. Fort Benton.

Q. How long have you resided there?

A. Oh, about 36 years.

Q. What is your occupation?

A. Manager of the Fay Adams Implement House.

Q. And how long have you been in that position?

A. Oh, since '44, roughly.

Q. And during that period during '44 were you familiar with the books of account and the charges of that concern? A. Yes.

(Testimony of Maurice Farrell.)

Q. Do you know Noel Anderson? A. Yes.

Q. How long have you known him?

A. Oh, I have known him a good many years.

Q. Did you know his father, A. E. Anderson?

A. I did. [57]

Q. Did you have business relations with either the old partnership or the Noel Anderson & Sons partnership such as took you to the ranch of the Andersons? A. Yes.

Q. And do you recall any particular time when you were there?

A. Oh, I have been there on different occasions; the exact year I couldn't tell you that without looking it up.

Q. Do you know whether it was before or after A. E. Anderson died?

A. Well, I was there before and after, both.

Q. What were the occasions for your visiting the ranch?

A. Well, one occasion I remember of distinctly we had bought iron and I went out after it. We had bought it from A. E. Anderson.

Q. Are you acquainted with Noel Anderson, Jr., and Robert M. Anderson? A. I am.

Q. How long have you known them?

A. Practically ever since they were born.

Q. Did you see either or both of these boys at any time you were at the ranch?

A. Well, understand I stated—I know that Noel junior was there.

(Testimony of Maurice Farrell.)

Q. Do you know what he was doing; did you see what [58] he was doing?

A. No, I didn't see what he was doing at the time.

Q. Do you know whether or not he was engaged in any of the farm work?

A. Well I imagined he was because I saw his dad give him orders to go do something.

Q. Did you see them doing any work like hauling grain or field work?

A. Not that particular time.

Q. Did you at any other time?

A. Well I have seen them working in the fields when I drove by there.

Q. When?

A. Well I have seen Junior working in the fields since he came back from the service.

Q. Did you see any work being done in '44 by either of the boys?

A. I wouldn't be that specific as to year.

Q. You are not sure then as to about '45?

A. No.

Q. Mr. Farrell, have the Anderson family done business with your firm over all this period since '44? A. Yes.

Q. Mr. Farrell, who did you do business with usually when you were transacting business in the sale or in your regular course of business?

A. With the Andersons? [59]

Q. Yes.

A. Well whoever came in that particular day.

(Testimony of Maurice Farrell.)

Q. And who would it be?

A. Well it would either be Noel or Junior or——

Q. The boys or Noel Anderson?

A. Or Noel Anderson. Before that Mr. A. E. Anderson.

Q. Before that Mr. A. E. Anderson?

A. Yes.

Q. What is the nature of your business, Mr. Farrell? A. Farm implement business.

Q. And what were the supplies, the type of purchases that were made?

A. Oh some of them were complete units such as plows, others were repairs.

Q. How do you handle your book accounts when a purchase is made?

A. Well that is usually up to the customer if his credit is good.

Mr. Angland: What is that last answer?

A. That is usually up to the customer if his credit is good.

Q. Do you have different charge slips and cash slips?

A. Well charge slips and cash slips both come out of the same machine but the cash slips are marked for whatever the purchase is and then marked "paid" and the charge slips are marked "charge." [60]

Q. I hand you Plaintiff's proposed Exhibit 13 and ask you to examine that? You recognize what it is? A. Yes.

Q. What is it?

(Testimony of Maurice Farrell.)

A. It is a slip of Fay Adams Implement Company to Noel Anderson & Sons for one Fairbanks Morse engine for $161.00.

Q. And can you tell from that slip whether it was a cash purchase or a charge?

A. This is a cash slip; it is marked "paid."

Q. I hand you Plaintiff's proposed Exhibit 14 and ask you to examine that? Is this the same sort of an exhibit, of a charge, same sort of a slip as Plaintiff's proposed Exhibit 13? A. Yes.

Q. Cash slip?

A. Yes, they are both cash slips.

The Court: Whose names?

Mr. Lewis: Noel Anderson & Sons.

The Court: Noel Anderson & Sons all of those slips show?

Mr. Lewis: The two slips are, if the Court please and the checks are signed by Noel Anderson & Sons; they were in '45, however.

Mr. Angland: Are you offering Plaintiff's Exhibits 13 and 14? [61]

Mr. Lewis: Yes.

Mr. Angland: To which we object, your Honor, to the offer of Plaintiff's proposed Exhibits 13 and 14 separately on the ground and for the reason that on the face of these exhibits they are shown to be transactions consummated with the concern in '46, both of them being marked 5/29/46. This case has to do with '45 and what was done by way of handling the business in '45 rather than in '46. They do

(Testimony of Maurice Farrell.)

not tend to prove or disprove the existence of the partnership for the tax year '45.

The Court: Have you got slips showing the same partnership name for '45?

Mr. Lewis: I do not, if the Court please.

The Court: What?

Mr. Lewis: We do not have any for '45, if the Court please. The purpose of the introduction of these slips and these proposed exhibits is to show the continuation of the partnership of A. E. Anderson & Son to illustrate further the intent.

The Court: A continuation from when?

Mr. Lewis: From January first, from the beginning of the partnership January first, '45, on through to '50.

Mr. Angland: Your Honor, that is the very question at issue, as to whether or not there was a partnership in '45. Mr. Lewis offers to prove the existence of a partnership during the taxable year '45 by offering evidence of transactions for the middle of '46. [62]

Mr. Lewis: That is right.

The Court: There must be an existing partnership under the law, of course, existing at the time in question, '45.

Mr. Lewis: That is correct. Now Mr. Anderson testified, as you will recall, that the partnership was formed at the beginning of January, '45, and continued on through; that the bank account of Noel Anderson & Sons was not opened until '46; therefore, we do not have slips showing the firm of

(Testimony of Maurice Farrell.)

Noel Anderson & Sons for '45 but that will be explained as the evidence is brought out.

Mr. Angland: I don't see how, your Honor, how the fact there isn't a bank account in the name of Noel Anderson & Sons in '45 tends to prove, that the exhibits showing the transactions in the middle of '46 tend to prove the existence of the partnership in '45.

The Court: Well he began, established the partnership and began with purchases or business transactions during '45 and then continued on; that would show a continuation and beginning of it. The question here, the vital question here is the existence of this family partnership in '45.

Mr. Angland: That is the vital question.

The Court: And if you began in '46 why that doesn't cover.

Mr. Angland: No, that doesn't.

Mr. Lewis: No, and there is no purpose by these exhibits to show it began in '46 and of course the purpose [63] is to show there was a continuation clear on through these other years.

The Court: Let's see what proof you have to make.

Mr. Angland: May I call the Court's attention to a case your Honor may have read, a decision by Judge Pope in the Harkness case; is your Honor familiar with that?

The Court: Yes.

Mr. Angland: That very question is passed upon in that case, and it would apply in this case; this

(Testimony of Maurice Farrell.)

evidence would not tend to prove the existence of the partnership in '45.

The Court: It is not according to Judge Pope's decision in that case; it is not according to the intent to enter into a partnership sometime in the future, a family partnership, but does one exist now, is it in existence?

Mr. Angland: That is the point; that is the reason for our objection.

The Court: I will sustain the objection until you bring some further proof of the existence of it in '45, then perhaps you can continue on and show a continuation of it, but you have to establish the present existence; except through the testimony of Mr. Anderson, of course, he tells us but if you are going to show its existence by evidence of this kind. [64]

Mr. Lewis: I think we will have to.

The Court: Take that up later.

Mr. Lewis: Take that up later if that is the case because we will have to go on with the proof through the Anderson family first, which I would have done normally.

The Court: All right, go ahead.

Mr. Lewis: That is all for now, Mr. Farrell.

MAURICE FARRELL

Cross-Examination

By Mr. Bowen:

Q. Mr. Farrell, you stated on direct there was

(Testimony of Maurice Farrell.)

a period during which your company operated with A. E. Anderson & Sons that you remember dealing with Mr. A. E. Anderson? A. Yes.

Q. Then there was a period when you dealt with Mr. Noel Anderson, the plaintiff in this case, and then a period when you said you were dealing with Noel Anderson & Sons, is that a correct statement?

A. Yes.

Q. That was your understanding?

A. Yes.

Q. So that there was a period according to your understanding of the operation between the partnership, which year you were not sure, of the A. E. Anderson & Sons and the partnership, year not sure, of Noel Anderson [65] & Sons, during which time the business was carried on by Noel Anderson, the plaintiff in this case?

A. The way I understood the operation of their business during this period between A. E. Anderson and Noel Anderson & Sons my understanding was through an estate and that is the way we dealt with them was as an estate and Noel Anderson did the business for the estate in our estimation.

Q. Mr. Farrell, you brought with you, did you not, at joint request of counsel in this case, your ledger accounts for the year '45?

A. That is right.

Q. Do you have those with you?

A. I think they are in the other office.

Q. To carry on while he is getting those ledger

(Testimony of Maurice Farrell.)

accounts, do you remember a conference had in your office between yourself and me and Mr. Henoland, internal revenue agent, Tuesday of this week discussing these business transactions herein concerned? You do remember our visit? A. Yes.

Q. Do you recall stating at that time, and I am just trying to refresh your recollection and I am not trying to put words in your mouth, that it was your understanding that for a period you dealt with A. E. Anderson, a partnership, and then Mr. Noel Anderson, the plaintiff herein, and then Noel Anderson & Sons, a partnership? [66]

A. If I made the statement we dealt with Noel Anderson in between the two partnerships——

Q. You had in mind the estate?

A. I had in mind the estate, yes.

Q. Will you turn, Mr. Farrell, to your ledger accounts for '45? To clarify what you record in these ledger accounts, Mr. Farrell, isn't it true that you note there the credit business that you do?

A. That is right.

Q. And the slips identified as Plaintiff's Exhibits 13 and 14 were records of cash business, is that correct? A. That is right.

Q. Have you examined your '45 ledger account to determine entries indicating business with the Anderson farm? A. Yes.

Q. Will you note for the record the first such entry?

Mr. Lewis: If the Court please, this is objected to as not proper cross-examination, and for the fur-

(Testimony of Maurice Farrell.)

ther reason that it is not the best evidence; the best evidence of the transactions are the slips themselves, the original entries, and we object to the use of the ledger without the use of the entries.

The Court: You keep this ledger, do you, yourself? [67]

A. No, it is kept by Mrs. Adams, the owner of the business.

The Court: Mrs. who?

A. Mrs. Adams, the owner of the business.

The Court: Well then it is not kept under your direction and observation?

A. No.

The Court: I will sustain the objection.

Mr. Bowen: Your Honor, to clarify his testimony.

Q. Isn't it true, Mr. Farrell, that you occasionally make entries in the ledger account?

A. I have in the past, yes.

Q. Then you periodically would have made ledger entries for the year '45, isn't that correct? In other words, didn't you tell me, Mr. Farrell, that you sort of worked with the books part time and Mrs. Adams worked with the books part time?

A. That is right.

Q. Is that your understanding?

A. It is under her supervision.

Q. Of course it is under her supervision because she is the manager of the business but as a matter of fact you did make entries in the book, did you not? A. Yes. [68]

(Testimony of Maurice Farrell.)

Q. And that is your original record, your original ledger account of the credit dealings with the Anderson farm in '45, is it not?

Mr. Lewis: To which we object on the ground that it shows on the face of it that it is not the original entry; it would have to be taken from some other book, and he described it as a ledger entry; it wouldn't be admissible.

The Court: Do you keep a daybook of your entries?

A. No, we don't. We use this.

Q. Do you make entries in that book, do you?

A. Occasionally, yes.

The Court: Well, if you have any entries to bring out that are material here during '45 that are made by this witness, I will allow you to bring out such testimony. I mean in reference to the Anderson transactions.

Q. (By Mr. Bowen): Can you refer to any entry in there in '45 with reference to business transacted with the Anderson family? And to refresh your recollection look at March 21, '45; was that entry made by you?

A. From the handwriting in the book I would say no.

Q. March 26, '45?

A. No, it was not my writing. [69]

Q. April 2nd, '45? A. No.

Q. May 18, '45? A. No, not my writing.

Q. August 21, '45? A. No.

(Testimony of Maurice Farrell.)

Q. Do you find any entries in '45 made by you recording dealings with the Anderson family?

A. None in this account. I don't see my writing any place.

Q. Turning then from the ledger accounts, Mr. Farrell, do you recall purchases made by farm help other than the immediate members of the Anderson family? In other words, you testified a while ago that purchases were usually made by, and you didn't state a definite period when made, you said they were often made by Mr. Anderson or his two sons, do you recall whether or not hired help came in and made purchases?

A. Well, to go back and say who bought anything, any one item just from memory I would say would be impossible, but the general procedure was whoever worked at the ranch would come in and get whatever they needed and that is the way we operated with them.

Q. Would it be proper, Mr. Farrell, for you to leave these ledger accounts here for the balance of the trial? A. Yes. [70]

Mr. Bowen: No further questions.

Mr. Lewis: No further questions at this time if the Court please, but we will want to recall the witness.

Mr. Angland: The Government will want to ask permission for this witness to leave; I imagine he will have to be up at Fort Benton if we issue a subpoena for Mrs. Adams. It appears she is a

(Testimony of Maurice Farrell.)

proper witness. Would it require your presence up there?

Mr. Farrell: Either she or myself would have to be there.

Mr. Angland: If we issue a subpoena for her, we would have to release this witness.

Mr. Lewis: We can't release this witness.

The Court: Bring Mrs. Adams up and leave him down there, and then send her back and bring this witness down.

Mr. Lewis: That is all for now.

NOEL ANDERSON

resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Lewis:

Q. Mr. Anderson, referring again to Plaintiff's Exhibit 9 and calling your attention to Plaintiff's Exhibit 9-a, will you please state whether that contains all of the income of the partnership of Noel Anderson [71] and Sons during the year '45?

A. It is.

Q. Then will you turn to Plaintiff's Exhibit 9-b and 9-c and 9-d and 9-e; will you please state what those pages in the book, those exhibits cover?

A. That is a record of the expenditures or expenses of the partnership.

Q. Noel Anderson & Sons partnership?

A. Yes.

(Testimony of Noel Anderson.)

Q. For '45? A. For '45.

Q. Now when you made up your federal income tax returns is this the book you refer to to get the information to make up your returns?

A. That is the book.

Q. And do the pages I have just referred to of 9-a, 9-b, 9-c, 9-d, 9-e, contain all of the record of receipts and expenditures of the partnership of Noel Anderson & Sons for '45 that was used in making up your partnership returns, federal income tax returns, partnership and individual for that year? A. That is right.

Q. And Plaintiff's Exhibit 9-a is on page 2 of the book? A. Yes, page 2 of the book.

Q. 9-b is on pages 27 and 28? A. Yes. [72]

Q. And 9-c is on pages 29 and 30?

A. Yes.

Q. And 9-d is on pages 31 and 32?

A. Yes.

Q. And 9-e is on pages 33 and 34?

A. Yes.

Mr. Lewis: We offer in evidence at this time Plaintiff's Exhibits 9-a, b, c, d, and e, contained in Plaintiff's Exhibit 9, which is the cash book.

The Court: What is it called?

Mr. Lewis: Cash book of Noel Anderson & Sons partnership account.

The Court: Any objection?

Mr. Bowen: No objection, your Honor.

The Court: Is there any place in the book where partnership is written out?

(Testimony of Noel Anderson.)

Mr. Lewis: I think there is not.

The Court: It may be received in evidence.

Q. (By Mr. Lewis): Mr. Anderson, I hand you Plaintiff's proposed Exhibit No. 12 and ask you to examine it? Do you know what this book is?

A. It is a ledger containing the accounts of the members of the partnership.

Q. Of Noel Anderson & Sons?

A. Of Noel Anderson & Sons. [73]

Q. Does it cover the year '45?

A. It does.

Q. From the beginning of the partnership on January 1st, '45? A. That's right.

Q. And does it carry on through continuously until the year '51? A. It does.

Q. Now, Mr. Anderson, directing your attention to Robert Anderson's account.

A. Page 1.

Q. Page 1 of the book. Will you state what that sheet on page 1 of Plaintiff's Exhibit 12 is?

A. That is an account, Robert Anderson's account of his withdrawals.

Q. In cash? A. In cash, yes.

Q. From what period to what period?

A. This is for the year '45.

Q. And are there other withdrawals in the book of Robert Anderson for each of the years for his cash withdrawals? A. That is right.

Q. Was there any withdrawal in cash by Noel J. Anderson during the year '45?

(Testimony of Noel Anderson.)

A. During the year '45 Noel J. Anderson was in the Army. [74]

Q. All the time? A. All the time.

Q. So there is no account of cash withdrawals during that year? A. That is right.

Q. Does the book contain other years showing the cash withdrawals of Noel J. Anderson?

A. It does.

Q. As part of his earnings in the partnership of Noel Anderson & Sons?

A. That is right.

Q. And will you please state what page and the year that they appear on?

A. On page 3 there is an account for '46 showing his cash withdrawals.

Q. And the next one for Noel J. Anderson?

Mr. Bowen; Your Honor, the earliest account apparently is, or rather the earliest withdrawal in the name of Noel was in the year '46; here again bearing upon a subsequent year to the year in issue; hardly relevant for the reasons proffered earlier.

Mr. Lewis: If your Honor please, in this same book is another account, which includes both charges against Noel Anderson in '45 and his withdrawals, if any, and that is true of all members of the partnership and I am getting to that. [75]

The Court: As I understand here is your book of account that begins in '45 and that goes on continuously to '51?

Mr. Lewis: That is correct.

(Testimony of Noel Anderson.)

The Court: And as I understand this account has not been admitted in evidence?

Mr. Lewis: No, not yet, if the court please; not this one. I am identifying what it is.

The Court: Well it seems to me with a foundation of that kind showing the beginning of the partnership of the books and accounts giving the details, the dates, the exact date of the beginning of the partnership and going on continuously would have some bearing on the issues here. You have got a pretty fine proposition to separate and segregate and say that having once established the beginning of a partnership you can't show a continuation of it if it is material. Now in the Pope decision they didn't establish a family partnership at all but they showed an intent of creating one in the future. That is my recollection of Judge Pope's decision, that is the gist of it, but now here they have practically been establishing the beginning of that partnership; now have we got any right to cut it off in '46 if it has any bearing upon the question of good faith and the intention really to create this partnership; can we say that it ended in '45? [76]

Mr. Bowen: I agree, your Honor, and suggest that this matter speaks for itself and the year '46 might be relevant as would the year '52, but rather than take up the court's time with all of these subsequent periods.

The Court: Here is a book and if it is introduced in evidence it speaks for itself.

Mr. Lewis: That is very true.

(Testimony of Noel Anderson.)

The Court: Go ahead and get a move on. Let's move a little faster or we won't get through for a week the way we are going now.

Q. (By Mr. Lewis): Will you please refer to the account of Noel J. Anderson, page 60?

A. Yes.

Q. What does that account show, not the items, but what does it cover?

A. It is a record of Noel J. Anderson's credits and withdrawals.

Q. Does it include the original charge against him for his share in the partnership?

A. It does.

Q. And carries on down through to the payment of the income tax for '50 and the early part of '51?

A. That is right.

Q. Now the items of earnings that are credited to him there, how were they arrived at? [77]

A. They were taken from the partnership income returns.

Q. Tax returns each year?

A. That is right.

Q. And that is the way you kept track of the credits? A. That is his net earnings.

Q. Are there any charges that should be made against any member of the partnership that do not appear on page 12, anything that you have bought that, in the course of the business, for instance?

A. The boys are not charged with their interest in new equipment purchased.

Q. But what is the situation as to their liability?

(Testimony of Noel Anderson.)

A. They own 1/6th interest in that new equipment.

Q. And if the partnership were to be closed up at any time that share would have to be charged against them in addition to these charges?

A. It would.

Q. Now is that true of page 58 for Noel and Agnes Anderson?

A. We have not been charged yet.

Q. But does 58 contain the entire withdrawals except for the share in the machinery that had been purchased of Noel and Agnes Anderson up to the beginning of '51 and including the payment of the '50 income tax? A. That is right. [78]

Q. And likewise does it include all of the credits for Noel's and Agnes' share in the earnings?

A. Up to and including the year '50.

Q. Now turn to page 62, the account of Robert M. Anderson, does that contain all of the withdrawals of Robert M. Anderson since January 1st, 1945, from the Noel Anderson & Sons partnership?

A. It does.

Q. And does it include the original charge of $7500 for his share? A. It does.

Q. And does it include all of the credits for partnership earnings of that period?

A. Up to including the year '50.

Q. And it also includes the charge for the payment of his income tax for '50?

A. That is right.

(Testimony of Noel Anderson.)

Q. Now, Mr. Anderson, who made that book and who entered the entries in it?

A. It is my work.

Q. And is that the way you keep track of the position of the various partners with reference to how much they have drawn and how much credits they have in the partnership?

A. It is my record as I have kept it. [79]

Q. And that is complete for the entire period from January 1st, '45, to January 1st, '51?

A. To the best of my knowledge it is.

Mr. Bowen: One question, your Honor.

Q. (By Mr. Bowen): Was this book kept currently with the events which it allegedly records? In other words, were the entries for the year '45 made in '45 or were they made at a subsequent period?

A. There are entries for '45 possibly were made in the early part of '46.

Q. In other words, you are stating that you had this book prior to the spring of '47?

A. I did.

Mr. Lewis: We offer in evidence Plaintiff's Exhibit 12.

The Court: Is that the one you have just been questioning the witness concerning?

Mr. Lewis: That is the one.

The Court: Well how about it, any objections to Plaintiff's Exhibit 12?

Mr. Bowen: No objection.

The Court: It may be received in evidence.

(Testimony of Noel Anderson.)

Q. (By Mr. Lewis): Mr. Anderson, have you figured up how the accounts with the two boys stand now with reference to their earnings and their withdrawals, including the charge for the [80] partnership share?

A. I have up to and including the year of '50.

Q. And do you know what that is or do you have to refer to your books?

A. I can't give you the exact figures, no.

Q. By referring to your memorandum could you? A. Yes.

Q. Is this sheet of paper a memorandum made by you from the record? A. It is.

Q. Now, Mr. Anderson, what is the situation with reference to Noel J. Anderson, including the charge of $7500.00 for his share?

A. The account of Noel J. Anderson shows total charges of $32,187.72, credits of $39,464.03, which does not include a charge for his interest in new equipment purchased.

Q. Now that is not on the books, is it because of the fact you make your income tax returns?

A. Well I don't know of any reason why it isn't there, but it isn't there.

Q. I mean in making the income tax returns your machinery is all put in on a depreciation schedule, is it not? A. That is right. [81]

Q. So the net earnings as shown by the income tax return would not include charges for new machinery, would it? A. That is right.

Mr. Angland: Just a minute. I am going to ob-

(Testimony of Noel Anderson.)

ject to counsel leading and suggesting to that extent again, your Honor.

The Court: Well he has forgotten the whether or no question.

Mr. Angland: That was quite an explanation of the answer to be given in that last one.

Q. (By Mr. Lewis): Mr. Anderson, will you state whether or not the charges for the new machinery that you buy from time to time in the partnership are charged off as expense in the income tax return.

A. They are entered on the depreciation schedule and depreciated.

Q. But they are actually paid for as they are bought, are they? A. Yes.

Q. And how are they paid for?

A. Paid for in cash from the partnership account.

Q. Taking that into consideration then, Mr. Anderson, approximately what is the situation with reference to Noel J. Anderson's account on January 1st, 1951. [82]

A. Adding his share in the new equipment to his total withdrawals would leave him a credit of a little less than $2,000.00, I believe.

Q. And that remains where; where is the money if there is any money to take care of it?

A. In the partnership account.

Q. Referring to Robert M. Anderson's account what is the situation with reference to that?

A. Robert Anderson's account shows total

(Testimony of Noel Anderson.)

charges of $34,858.18, total credits of $39,464.03, and these charges do not include the $5,362.09 for his interest in the new equipment.

Q. If you take that into consideration, what is the condition of his account approximately on January 1st, 1951?

A. His withdrawals would exceed his credits by roughly four or five hundred dollars.

Q. Then he has withdrawn his share of the profits during this period, is that right?

A. He has.

Q. And the indebtedness he owed in the beginning has been paid? A. It has.

Q. That indebtedness, when was that indebtedness paid with reference to '45?

Mr. Angland: What indebtedness are you talking about now, the new equipment? [83]

Mr. Lewis: The original indebtedness of $7500.

A. I believe that was paid at the end of '50.

Q. About the end of '50?

A. About the end of '50.

Q. Was that true of both boys?

A. Generally speaking, yes.

Q. Now did Noel Anderson and Agnes Anderson withdraw their profits from the partnership account from time to time since January first, '45?

A. We did.

Q. As shown by the ledger account?

A. That is right.

Q. And state whether or not there has been a

(Testimony of Noel Anderson.)

continuous bank account of Noel Anderson & Sons since April 30th, '46, in the Chouteau County bank?

A. There has been.

Q. And still is? A. Still is.

Q. Now do you know whether or not at all times during that period there have been funds on hand with which to pay the shares due, share of earnings due the various members of the partnership?

A. I am quite sure there have been sufficient funds at all times.

Q. Do you know anything about the condition of the account at the present time? [84]

Mr. Angland: Well, what difference does it make? I will object to that as unduly prolonging the examination of this witness; what difference does it make?

Mr. Lewis: To show intent. I am showing the partnership is continuing concern up to the present time.

The Court: All right, go ahead.

Mr. Lewis: I didn't get the court's ruling.

The Court: Did you make an objection?

Mr. Angland: I object to it as being irrelevant. I said I don't see what difference it makes what the status of the account is in 1952, whether it is a profitable enterprise or unprofitable enterprise. We are interested in determining whether or not there was a partnership existing in fact in '45.

The Court: The only materiality I would see would be as to the continuance, if they satisfactorily establish the beginning as of January 1st, 1945,

(Testimony of Noel Anderson.)

otherwise then there is a question or materiality as to anything beyond that, beyond the year '45. The real question is have you and can you establish this partnership as of '45?

Mr. Lewis: That is true.

The Court: That is the law.

Mr. Lewis: That is the law and whether they bonafidely intended to enter into a partnership in that period. [85]

The Court: It is irrelevant until you satisfactorily establish that if you can.

Q. (By Mr. Lewis): I hand you Plantiffs' proposed Exhibit No. 22 and ask you to examine it. Let me hand you 21 first; do you recognize this?

A. I do.

Q. What is it?

A. It is a deed from me to my wife conveying one-third interest in the real estate involved in this partnership.

Q. In the partnership of Noel Anderson & Sons?

A. That is right.

Q. I ask you to examine proposed Exhibit No. 22. Can you state what that is?

A. That is a deed signed by my wife and myself conveying a one-sixth interest in this real estate to Noel J. Anderson.

Q. And the real estate that is involved in the partnership of Noel Anderson & Sons?

A. That is right.

Q. I will ask you to examine Plaintiffs' proposed Exhibit No. 23 and state what it is?

(Testimony of Noel Anderson.)

A. It is a deed signed by my wife and myself conveying an undivided one-sixth interest in the real estate involved in this partnership to Robert M. Anderson. [86]

Q. Mr. Anderson, who held the legal title to this property after the deeds from your sister and your mother, which are already in evidence here and the decree of distribution in the A. E. Anderson estate which is in evidence here, from that time on up to the execution of Plaintiff's proposed Exhibits 21, 22, and 23?

A. The real estate was in my name.

Q. These carry the same date, do they not?

A. That is right.

Q. And what date is that?

A. 15th day of May, 1951.

Q. Now why, if you have any reason, was the period so long between the time that you acquired the full title to the real estate in question to the execution of this deed; why was that period?

Mr. Angland: We will object to that, your Honor; an explanation is not called for. The record as now made shows the title was acquired by this witness from the estate and from his mother and sister in the year '46, and the deeds weren't executed until '51. Why that was done, to explain something that would relate back and show the existence of the partnership in the year '45 is almost inconceivable, and I can't believe that any answer this witness might make would tend to prove or disprove any issue in the case. [87]

(Testimony of Noel Anderson.)

The Court: Well I will let him give his reasons; it may be of no consequence or materiality but we will see. I don't know what he is going to say. Well what was the reason if you had any?

A. The deeds were not given to the boys because they had not earned their shares in the real estate.

The Court: You mean they hadn't paid for their interest?

A. They had not earned their interest.

Q. (By Mr. Lewis): Or paid for it?

A. That is correct.

Q. And was there any particular reason why the deed hadn't been executed to your wife before that?

A. No particular reason; that would come in time. I saw no reason for haste.

Q. And during this period of time was this property in fact the property of the partnership of Noel Anderson & Sons?

Mr. Angland: Just a minute. Now, your Honor, we will object to that; the record now made speaks for itself.

The Court: He has already testified this forenoon; I think he told about where the legal title stood. It is just a repetition of really what was gone into this morning. [88]

Mr. Lewis: We offer in evidence Plaintiff's proposed Exhibits 21, 22 and 23.

Mr. Angland: We will object to the offer of these, to the introduction of these proposed exhibits 21, 22, and 23, for the reason that they on

(Testimony of Noel Anderson.)

their face show that certain property, certain real estate was deeded to the individuals named in the exhibits in the year '51, and that evidence does not tend to prove the existence of a partnership between the persons named during the year '45, the year in question in this case.

The Court: Well he gave an explanation why these interests weren't deeded before and they were deeded then; I will let them go in for whatever they are worth.

Q. (By Mr. Lewis): I hand you again, Mr. Anderson, Plaintiff's proposed Exhibit No. 10. This is what you testified to this morning. That is the amended federal income tax return for '45?

A. Yes.

Q. Now does that show, Mr. Anderson, the complete receipts and expenditures of the firm of Noel Anderson and Sons during that period with the exception of the new machinery which may have been purchased? A. Yes, it does. [89]

Q. State whether or not that return was made in the regular course of business of the firm of Noel Anderson & Sons showing their first year's operation? A. That is correct.

Mr. Lewis: Now if the court please, this is a copy and the counsel for the Government has the original return; it needs completion as to signature only and we have agreed that that may be completed, and I now offer it in evidence after the completion.

The Court: Any objection?

(Testimony of Noel Anderson.)

Mr. Lewis: We offer it now with the understanding it is to be completed, Plaintiff's proposed Exhibit 10.

The Court: Very well, any objection?

Mr. Angland: No objection.

The Court: It may be received in evidence.

The Court: We will have to take. a recess (3:10 p.m.)

(Court resumed, pursuant to recess, at 3:30 o'clock p.m., at which time counsel and parties were present.)

The Court: Proceed.

NOEL ANDERSON

resumed the stand and testified as follows

Direct Examination
(Continued)

By Mr. Lewis: [90]

Q. Mr. Anderson, I hand you Plaintiff's proposed Exhibit No. 24, and ask you if you recognize what that is?

A. That is a partnership return of income for the year '45, Noel Anderson & Sons partnership.

Q. And does it include the individual returns of the various partners? A. Yes, it does.

Q. That is a copy, is it, of the original return you filed for '45? A. That is right.

Mr. Angland: Mr. Lewis, we can save your time and possibly the witness' and court's time, and we

(Testimony of Noel Anderson.)

will agree to submit photostatic copies of the original return submitted for '45 by the partnership, by Noel Anderson, by Robert Anderson and Noel Anderson, Jr., and Agnes Anderson.

Mr. Lewis: The original and the amended return for '45.

Mr. Angland: If that is agreeable to you we will have photostatic copies made.

Mr. Lewis: They will have to be marked. The amended return is marked and now I am offering Plaintiff's proposed Exhibit No. 24 with that understanding.

The Court: Very well, it may be received in evidence. [91]

Mr. Angland: That is offered as one exhibit?

Mr. Lewis: Exhibit 24 will be a complete return showing the partnership return and each of the individual returns.

Mr. Angland: I am wondering if to be certain wouldn't it be a good idea to have the Clerk identify them.

Mr. Lewis: Then each sheet should be marked in both of the exhibits.

Mr. Angland: I was going to say if you mark the partnership return for '45 and then the amended return for '45 as 24-a.

Mr. Lewis: They are both marked.

Mr. Angland: Oh, you have already got them marked?

Mr. Lewis: Yes.

Mr. Angland: Well we will let it go in that

(Testimony of Noel Anderson.)

fashion and we will substitute photostatic copies of these if agreeable to you.

Mr. Lewis: Yes.

Q. (By Mr. Lewis): Mr. Anderson, when did you first have any intimation after you filed the original return, partnership return for '45, that there was any question to be raised by the Bureau of Internal Revenue?

A. It was in March of '47. [92]

Q. Now up to that time did you have any idea at all that the partnership would be questioned?

A. Not that I can remember.

Q. And when did you open the bank account in the name of Noel Anderson & Sons?

A. It was on May 1st of '46.

Q. Now for '45 where were you keeping the funds of the A. E. Anderson partnership which you were closing up that year as you have previously testified to, the estate funds that you had and the funds of the Noel Anderson & Sons partnership?

Mr. Angland: That is objected to, your Honor, as not being an accurate statement of the facts as stated by the witness. The A. E. Anderson estate was not distributed until '46, in August of '46, nor were the deeds given to this witness by his sister and his mother until May of '46, so that there wasn't a situation where the affairs of the A. E. Anderson estate had been closed in '45; that isn't the situation at all as I understand the evidence.

The Court: He was the administrator?

(Testimony of Noel Anderson.)

Mr. Angland: No, he wasn't; his mother was the administratrix.

Mr. Lewis: If the court please, he was the surviving partner of the A. E. Anderson partnership and the matter of some of the estate funds were mixed up with some estate funds of the A. E. Anderson estate which were being closed up in '44 and '45. [93]

The Court: All right, I will let him answer the question.

(Question read.)

Q. Now for '45 where were you keeping the funds of the A. E. Anderson partnership which you were closing up that year as you have previously testified to, the estate funds that you had and the funds of the Noel Anderson & Sons partnership?

A. They were all in the A. E. Anderson & Son account.

Q. And when was that account opened, when and where was it opened?

A. It was opened in January of '44, Chouteau County Bank, Fort Benton.

Q. State whether or not you used that account during the year '45 as a depository for the funds of Noel Anderson & Sons partnership?

A. I did.

Q. And when did you cease to use that account as a depository for the Noel Anderson & Sons partnership?

A. When the account was closed April 30th or May 1st, '46.

(Testimony of Noel Anderson.)

Q. And when that account was closed, what was done with the funds that were left in the account at that time?

A. They were transferred to the account of Noel Anderson & Sons. [94]

Q. Now state whether or not there has been a continuous account of Noel Anderson & Sons in the Chouteau County Bank from the date it was opened on April 1st or May 1st, '46, to the present time?

A. There has been a continuous account.

Q. Now when the audit was being made by the Bureau of Internal Revenue of this '45 income tax return some time elapsed since the opening of the Noel Anderson & Sons account?

A. It had.

Q. In other words, it was from the 1st of May or thereabouts to some time in the spring of '47?

A. That is right.

Q. And in whose name were you transacting business for the partnership during that period?

A. In the name of Noel Anderson & Sons.

Q. Did you make your purchases in that name?

Mr. Angland: Just a minute. The evidence of the purchases is the best evidence so that we object that his statement is not the best evidence.

Mr. Lewis: It might have been cash purchases.

The Court: Well you can inquire whether or not the purchases were made in that name, that partnership name, and you can then supplement it by

(Testimony of Noel Anderson.)

specific instances if he wants to. Answer the question.

A. The purchases were made in the name of Noel Anderson & Sons. [95]

Q. And how were they paid?

A. They were paid from the account of Noel Anderson & Sons.

The Court: You are speaking now of May, 1946?

Mr. Lewis: From May, 1946, on.

Q. Will you state whether or not you sold any of the wheat grown by the partnership Noel Anderson & Sons during the year '45, no matter when it was sold, whether you sold that in the name of Noel Anderson & Sons?

A. I don't believe it was in the year '45.

Q. Was it in '46? A. It was.

Q. And was that part of the crop of '45?

A. It was.

Q. And part of the crop raised by the partnership Noel Anderson & Sons in '45?

A. That is correct.

Q. I hand you Plaintiff's proposed Exhibits 25 and 26 and ask you to identify them, please.

A. These are contracts of sale of bonus wheat that was hauled to the Greeley Elevator at Loma, Montana.

Q. And what wheat was it, where was it raised?

A. It was raised on the ranch.

Q. By whom?

A. By the Noel Anderson & Sons partnership in the year '45. [96]

(Testimony of Noel Anderson.)

Q. Raised in '45? A. Yes.

Q. Now will you tell the court what you meant by the term bonus wheat?

A. If I remember correctly, there was a big demand for wheat for export and the Commodity Credit Corporation offered a bonus to farmers who would haul their wheat in at that time and deliver it.

Q. And did you have the wheat represented by these Exhibits 25 and 26 in storage on the Noel Anderson & Sons ranch at that time?

A. That is correct.

Q. And as a result of that did you enter into a contract, did the partnership of Noel Anderson & Sons enter into a contract with the Government with reference to the sale of that wheat at that bonus?

A. That is right.

Q. Will you examine the Exhibits 25 and 26 and tell me whose signature appears thereon?

A. They are signed Noel Anderson & Sons by Noel Anderson.

Q. Is that your signature?

A. It is my signature.

Mr. Angland: We can't tell when delivery is made offhand. I noticed the agreement to sell. You are offering these at this time? [97]

Mr. Lewis: Yes.

Mr. Angland: May we make an inquiry?

Q. (By Mr. Angland): Was this wheat, as is evidenced by Plaintiff's Exhibits 25 and 26, wheat

(Testimony of Noel Anderson.)

that you had stored in the Greeley Elevator, is that the situation?

A. It was stored on the ranch and in May of '46 hauled to town.

Q. It was hauled to town in May of '46?

A. Yes.

Q. Apparently it was hauled in on May 15th of '46 and stored in the Greeley Elevator, at that time, is that right? A. That is right.

Q. And then on May 17th, no, May 23rd, '46, you entered into the agreement, is that it?

A. That is correct.

Q. Do you know whose name the wheat was stored in at the Greeley Elevator between May 15th, '46, and the time that you entered into these agreements?

A. I am quite sure it was stored in the name of Noel Anderson & Sons.

Q. You are not certain then?

A. I can think of no reason why it should be otherwise. [98]

Q. Well, looking at a summary that has been furnished by the Greeley Elevator Company it does not reflect that situation; it reflects the wheat as being Commodity Credit Corporation for Noel Anderson, now is it wheat that you had obtained a loan on from the Commodity Credit Corporation?

A. No.

Q. Well you understand why an entry of that kind would be made as of the 17th of May, 1946, showing Commodity Credit Corporation for Noel

(Testimony of Noel Anderson.)

Anderson by the Greeley Elevator, can you explain that to us as it might relate to these exhibits?

A. Quite frequently when we haul wheat to the elevators or transact other business the elevator man or whoever it may be has to be reminded of the fact that this is Noel Anderson & Sons wheat.

Q. What I am trying to get at, Mr. Anderson, is how the entry happened to be, if it is a fact when we reach that point, that the Greeley Elevator, Commodity Credit Corporation for Noel Anderson, as that may relate to these contracts dated within a week later?

A. I cannot explain what they do; all I know is what I do in signing these contracts. [99]

Q. The import of it—I am not trying to be unfair with you—the import of it is this; as we have our record the first time I have this wheat was a transaction in the name of Noel Anderson & Sons; it is the first and earliest date we have, and, of course, you have already testified concerning '45 wheat, so that we are interested in whether the elevator man was notified on the first occasion it wouldn't be a mistake on his part to have the wrong name; on the first occasion he would first have to be advised of the partnership. So that you will understand what we are asking you about, we are trying to get the connection between this entry of Commodity Credit Corporation for Noel Anderson on the 17th of May, '46, and the sale contract between Noel Anderson & Sons by you on the 23rd day of May, 1946, with Commodity Credit Corporation.

(Testimony of Noel Anderson.)

This is a contract with the Commodity Credit Corporation.

Mr. Bowen: If the Court please, on the reverse side of it appears to be terms and conditions for dealing with the Commodity Credit Corporation, and under paragraph three, plan 1, it reads: "Commodity agrees to pay the purchase price of the wheat in accordance with whichever one of the following plans is designated on the reverse side hereof in the space provided therefor: [100] The Bonus and the market price shall be paid as soon as practicable after the date elected for determining the market price." Now referring to the front side I see you elected the date 12/30/46, "as the date of which the market price of the above-described wheat shall be determined." So it would seem to follow from the terms and conditions here that sale or at least payment would not be made until as soon as it is practicable after the date elected for determining market price; necessarily that would be some time in '47, is that correct?

A. I believe the payment was received sometime in '47.

Q. In '47? A. It was.

Q. So that according to this the first payment on wheat in the name of Noel Anderson & Son from all that has been established so far was made in '47, is that right?

Mr. Lewis: That is objected to; if the Court please, I consented to inquiry here but we should

(Testimony of Noel Anderson.)

not go on into the case. That is getting clear away from the proposition.

Mr. Angland: That is correct.

Mr. Lewis: We offer in evidence, if the Court please, plaintiff's proposed Exhibits 25 and 26. [101]

The Court: What do you call them? What are they?

The Witness: Contracts on sale of wheat.

Mr. Lewis: With the local Production and Marketing Administration office as representatives of the Commodity Credit Corporation.

The Witness: That is correct.

The Court: Is there any objection?

Mr. Angland: I don't believe so, your Honor. They do not show the existence of a partnership in '45.

The Court: Except that his testimony would connect up on account of the wheat being raised then. I think they should be admitted for whatever value may be placed upon them later on as evidence.

Q. (By Mr. Lewis): Mr. Anderson, as a result of that audit by the Bureau of Internal Revenue in '47 a deficit tax was levied against you; the partnership for tax purposes was disallowed, is that correct? A. That is right.

Q. And a deficit tax levied against you which is the subject of this suit?

A. That is right. [102]

Q. I hand you Plaintiff's proposed Exhibit 27 and ask you to examine it; what is it, please?

A. This is a check to the Collector of Internal

(Testimony of Noel Anderson.)

Revenue, dated November 10th, 1949, for the sum of $10,292.84, which was the deficiency assessment against me.

Q. At that time had you protested that assessment, deficiency assessment? A. I have.

Q. Have you been carrying the protest through in the adjustment and by this suit since that time?

A. I have.

Mr. Angland: I believe that is admitted in the pleadings, the deficiency. I have no objection.

Mr. Lewis: Then we offer in evidence Plaintiff's proposed Exhibit 27.

The Court: Very well. You have no objection. It may be received in evidence.

Q. (By Mr. Lewis): Of course, the check was drawn on the firm of Noel Anderson & Sons?

A. That is right. [103]

Q. And no definite disposition to whom it can be charged to can occur until this matter is settled?

A. That is correct.

Q. Mr. Anderson, was there any State land involved in the transfer of the property from you and your wife to Noel Anderson & Sons account?

A. You mean deed land?

Q. State land, leased land?

A. There was considerable leased land.

Q. And state whether or not it was a part of the original agreement that this State land would go with the deeded land? A. Yes.

Q. And what did you do with reference to the occupation of that land, the possession of it immedi-

(Testimony of Noel Anderson.)

ately after the formation of the partnership, was the operation, was it or was it not turned over to Noel Anderson & Sons partnership?

A. It was.

Q. And did you have leases from the state of Montana at that time?

A. There were leases in the name of A. E. Anderson & Son and some leases in the name of A. E. Anderson. [104]

Q. State whether or not it was a part of your agreement with them, with your sister and your mother that the State land leases would go with the rest of the property?

A. That was a part of the agreement.

Q. Mr. Anderson, was the expiration of these leases after the formation of the partnership expiration date of the leases?

Mr. Angland: Just a minute. Now I don't see that that is material at all when those leases expire; if there was a transfer of those leases, I think it is proper to go to the State Commissioner of Lands and have appropriate entry made. I think you and I and the Court are all familiar with that.

Mr. Lewis: That is what we have here.

Mr. Angland: If you have transfers for the year '45, I don't think we will have any objection.

Q. (By Mr. Lewis): Now, Mr. Anderson, you have testified that the possession of these lands they were turned over, these State lands, were turned over by you as representing the A. E. Anderson &

(Testimony of Noel Anderson.)

Son partnership and the A. E. Anderson estate to Noel Anderson & Sons?

A. That is right. [105]

Q. At the time the partnership was formed?

A. That is right.

Q. Were these lands cultivated and grazed by the Noel Anderson & Sons partnership from January 1st, '45? A. They were.

Q. Have they been in the possession of the partnership since that time? A. They have been.

Q. I hand you Plaintiff's proposed Exhibit 28 and ask you if you recognize the signatures thereon?

A. I do.

Q. What is the signature on that?

A. The first signature is A. E. Anderson & Son by Noel Anderson, lessee.

Q. I hand you Plaintiff's proposed Exhibit 29 and ask you to examine the signature?

A. The first signature is A. E. Anderson estate by Noel Anderson, lessee, shows representative of the administratrix.

Q. And you signed that, did you?

A. Yes.

Q. I hand you Plaintiff's proposed Exhibit No. 30 and ask you what that is?

A. It is a lease of State lands. [106]

Q. Is it or is it not a renewal of a former lease?

A. This lease is dated February 28th, '49, and is a renewal.

Q. Of a lease that was in existence January 1st, '45?

(Testimony of Noel Anderson.)

Mr. Angland: Just a minute. We will object to testimony of that kind, your Honor. If he has two leases let's see the two leases; they are the best evidence of what it is.

Mr. Lewis: Well I would like to inquire whether it is a renewal or not.

Mr. Angland: Mr. Lewis, if there is a renewal, let's see the lease that is renewed.

The Court: Is it a lease in '45?

Mr. Angland: This is a '49 renewal he is talking of; now where is the lease of '45 that was renewed?

The Court: Where is it?

Mr. Lewis: We surrender the original leases when we get new ones. I guess they don't use it any more. He already testified the partnership had control of the land from January 1st, '45, on this very land.

Mr. Angland: Your Honor, possibly the lease itself would disprove that statement. Now let's find out what the situation is. I am sure your Honor has done it and I am sure Mr. Lewis has done it; you probate an estate [107] and the deceased may have had a State lease, and finally when you finish the probate you ask the State Board to issue a new lease to the successor or interest in the final distribution, but that does not prove that the person entitled to distribution had a lease from the State at the outset and just does not prove that it isn't a renewal lease. Actually the State enters into a contract with someone entirely new.

The Court: That should be easy enough to get

(Testimony of Noel Anderson.)
the date of that original lease that was surrendered and find out if it was surrendered for a renewal lease; a renewal would say it was a renewal of a certain lease of a certain date.

Mr. Angland: He wants to say there was a renewal lease and say to the Court in this case that there was a lease between the same parties in existence prior to '49 and attempting to, by that testimony to show that such a lease was in existence in '45, and, of course, it doesn't; it isn't the best evidence of what the fact was in '45.

Mr. Lewis: I think I can straighten it out, if the Court please, if I get a chance.

The Court: All right. [108]

Q. (By Mr. Lewis): These two exhibits 30 and 31 were new leases to Noel Anderson & Sons?

A. That is correct.

Q. And had either A. E. Anderson or A. E. Anderson & Son held leases on this same land previously? A. They had.

Q. Did those leases expire? A. They did.

Q. And did you take these leases immediately following the expiration of those leases?

A. That is correct.

Q. And did you or did you not have crop on these lands during the year '45 that was harvested during the year '45?

A. Those State leases cover grazing land.

Q. Did you use those State leases, Exhibits 30 and 31, did you use that land as grazing lands in the

(Testimony of Noel Anderson.)

operation of the cattle owned by the partnership Noel Anderson and Sons in '45?

A. That is correct.

Mr. Lewis: If the Court please, the purpose of introducing this evidence now is to show continuing partnership to relate back to the beginning of '45. [109]

Mr. Angland: A continuing partnership relating back to '45, Mr. Lewis, is that what you stated?

Mr. Lewis: Well it shows that the partnership is in existence and operating, that is the purpose of it.

Mr. Angland: It shows that the State of Montana, referring specifically to Plaintiff's Exhibits 30 and 31, proposed Exhibit No. 30 shows that on February 28, 1949, the State of Montana entered into a lease with Noel Anderson & Sons; that is remote from '45 for the purpose of this case. Plaintiff's Exhibit proposed No. 31 shows that on February 28, 1952, long after the filing of this case, it shows the State of Montana entered into a lease with Noel Anderson & Sons for the leasing of certain lands. Both exhibits we submit, your Honor, do not tend to prove the existence of the very question in issue here as to whether or not the partnership was in existence in '45; to show the partnership in '49 or '52 does not show continuity that existing in the beginning in '45.

Mr. Lewis: May I state to the Court that I expect to cite to the Court cases that have decided that the actions of the partnership continuing on

(Testimony of Noel Anderson.)

through after the years involved are evidence admissible in showing good faith in entering into the partnership agreement. [110]

The Court: I think that you have to make some connection there. You can refer to '49 and '52 on a lease and say that that relates back to '45 without some proof of the relation back; it seems to me there must be some connection.

Mr. Lewis: That was the purpose of my inquiry.

The Court: If you can show some connection established, the renewal of leases of that date why I think that proof would be perfectly admissible, properly admissible if you can make that connection.

Mr. Angland: I think you have made an offer of Plaintiff's proposed Exhibits 28 and 29. We object to each of those exhibits on the grounds heretofore stated, Plaintiff's proposed Exhibit 28 is an assignment of a State agricultural grazing lease, dated March 15, 1947; it shows upon its face that Noel Anderson & Son were the assignees as of March 15, 1947; that prior thereto the lessee was A. E. Anderson & Son, which, of course, contradicts the very contention made by counsel and plaintiff in this case that the partnership of Noel Anderson & Sons was the partnership that had these lands. The assignments themselves show that they weren't made until '47; that is as to 28. Plaintiff's proposed Exhibit 29 is dated the same date, March 15th, '47, and shows the same situation.

(Testimony of Noel Anderson.)

Mr. Lewis: I think, if the Court please, I can clear it up. [111]

The Court: I will sustain the objection until the connection is made.

Q. (By Mr. Lewis): Mr. Anderson, will you state whether or not the lands described in Plaintiff's proposed Exhibits 28, 29, 30 and 31 are lands which were under lease by either A. E. Anderson or A. E. Anderson & Son prior to January 1st, '45?

A. Exhibit No. 28 is an assignment of a lease that was made on February 28th, '43.

Q. And who has been in possession of that land since the lease in '43?

Mr. Angland: Just a minute. Your Honor, we are going through the same situation right through here; and really we might as well settle it, Mr. Lewis and save the time of everybody.

The Court: He is testifying to written documents that are not present.

Mr. Angland: The record in this case does speak for itself; the lease was issued to A. E. Anderson & Son in '43 as shown by the exhibit the witness has.

The Witness: That is correct.

Mr. Angland: It was not assigned by A. E. Anderson & Son until March of '47; it contradicts the very thing that he is contending for that Noel Anderson & Sons had it [112] in '45. The assignment of the very record he has before him shows that the State of Montana had a contract with A. E. Anderson & Sons, '43 the date the lease was issued until the assignment in March, '47, and for any

(Testimony of Noel Anderson.)

other party to claim that lease would be contrary to the statutes of Montana; on the very face of it it is in conflict of the law applied.

Mr. Lewis: If the Court please, we can make proof here that these lands have been in the continuous possession and have been farmed by A. E. Anderson & Son since '43, and whenever the dates are that show on the instruments continues clear through to the present time either by A. E. Anderson & Son or Noel Anderson & Sons; now what the record title may be is immaterial. I could bring a dozen decisions into this Court to show the Court in partnership matters it does not make any difference whatsoever in whose name the property may be; it could be in one partner's name or be in somebody else's name; the thing is whether the partnership actually had possession and were operating lands or whatever it may be. Now there are plenty of decisions on that question. The facts in this case will refer to plaintiffs the entire time A. E. Anderson & Son were in operation and evidence that general business transactions are the same and the Bureau of Internal Revenue accepted it as a valid partnership. [113]

Mr. Lewis: Now it took time to get these transfers through, the estate was mixed up all the way through, and what we are attempting to show here we first show we had possession, the new partnership had possession from the start of the partnership, and now we are showing that they have now at the close of it title. They have acquired legal

(Testimony of Noel Anderson.)

title as well as actual possession and the operation on through the time. This isn't a question of the title, your Honor; this is a question of a contract between the State of Montana and A. E. Anderson & Sons. Noel Anderson was a 50 per cent partner and admittedly that question isn't raised and A. E. Anderson and A. E. Anderson & Sons is recognized as a partnership.

Mr. Angland: Now the assignment of these leases, if the Court will look at the proposed exhibit it shows it was only a matter of less than 30 days to have those assignments made when they were finally signed. They were approved in less than 30 days in '47. In '47 the assignment to my mind does not tend to prove, the assignment in '47 does not tend to prove the existence of a partnership of Noel Anderson & Sons in '45; rather it seems to me that it flies right in the face of what Judge Pope says, having the intent to form a partnership in the future at some time, and certainly to show in '47 [114] that there were overt acts to form this partnership does not prove existence of that partnership in '45. That is the very thing, I think, that Judge Pope holds; I should say the Court holds in the decision by Judge Pope in Harkness vs. Commissioner (C.A. 9th) 193 F. 2d 655.

Mr. Lewis: There was no evidence of partnership in existence in that very case.

Mr. Angland: Oh, yes, more than you have here, Mr. Lewis. There was a written agreement introduced in evidence.

(Testimony of Noel Anderson.)

The Court: Well you will have a chance later on to furnish authorities. The Court sustains the objection and we will admit it in the event you make the connection to show the existence of that, that they were assigned, that you took assignment later on, one was '52 and one was '49.

Mr. Lewis: And two assignments in '47.

The Court: Now it seems to me that you ought to be able to make that proof and establish that connection. There are too many years in between, too much time has elapsed to say they apply particularly to '45. Now let's hurry along.

Mr. Lewis: If the Court please, I have two or three exhibits along the same line on the operation of the partnership in the year '45. Now I don't want to take the time of the Court and it is just showing the partnership holdings, its use in the following year [115] of the formation of the partnership and I would like to; maybe we had better test out the first one.

The Court: Of course, I can see you have a very serious question arise here unless you are able to produce some evidence of '45; how is it you haven't anything on '45?

Mr. Lewis: If the Court please, there are four other witnesses to testify verbally as to what occurred in '45; it's got to be verbal testimony, and we can't take more than one witness at a time.

The Court: All right, go ahead.

(Testimony of Noel Anderson.)

Mr. Lewis: I shall leave this and recall Mr. Anderson as it seems best to do that.

The Court: All right. What have you got there?

Q. (By Mr. Lewis): Mr. Anderson, I hand you Plaintiff's proposed Exhibit No. 32 and I will ask you whether or not the firm Noel Anderson & Sons were doing business with Ragland Grocery Company during '45 at Fort Benton?

A. They were.

Q. Was that during the entire year '45 or not?

A. I am quite sure we did.

Q. And did you continue to do or not continue in business buying supplies of the Ragland Grocery during the following year '45 and on since then?

A. We have. [116]

Q. Do you recognize Plaintiff's proposed Exhibit 32? A. I do.

Q. Does that represent an account that you had with Ragland Grocery? A. It does.

Q. Did you pay that account? A. I did.

Q. And did you or did you not receive that as a receipt? A. I did.

Mr. Lewis: We offer in evidence Plaintiff's Exhibit 32.

Mr. Bowen: Objection, your Honor.

The Court: This is June 1st, '46.

Mr. Angland: The same situation, your Honor.

Mr. Bowen: Your Honor, if the Court please, by admission of counsel here the only casual connection between this proposed exhibit and the year '45 is the testimony of this interested party. I would like

(Testimony of Noel Anderson.)

to refer to the language of Judge Black in the Lusthaus vs. Commissioner case (327 U.S. 293, 302) decided in '45, which language was approved directly by the majority opinion in footnote 13, page 744 of the Culbertson case (Commissioner vs. Culbertson, 337 U.S. 733, 742) the language is "bona fide intent." He testified to his intent in '45, no act, no overt act relating and beginning in the year '45. We can't crawl into the brain of this [117] witness. We have to determine what he intended from what was done; he has shown no casual connection with facts, factors or acts, actual goings-on in the year '45, and we object to the admission of this exhibit as we objected to acts after '45 earlier today.

The Court: Are all of them '46 again?

Mr. Lewis: Yes.

The Court: I think I will have to sustain the objection.

Mr. Lewis: Very well.

The Court: I will sustain the objection.

Q. (By Mr. Lewis): Mr. Anderson, did your wife Agnes do any work in connection with the work of the partnership of Noel Anderson & Sons during the year '45? A. She did.

Q. What did she do?

A. She hauled wheat during harvest, performed errands going to town and getting supplies, repairs, attending to little details that I didn't have the time for.

Q. Had she done work of that character prior to '45 for the whole partnership?

(Testimony of Noel Anderson.)

A. She had. [118]

Q. What did it consist of aside from what you testified this morning about her driving the tractor, the pickup or the tractor?

A. She supervised the, did the cooking and some years and in other years she supervised the cooking with help for the hired help of the ranch.

Q. Can you recall the years?

A. Well not all the years.

Q. Who conducted the farming operations on the Anderson ranch during the season of '45?

A. You mean who did the work?

Q. Yes and in whose name?

A. In whose name was it?

Q. Who, what, who were the owners of the operation in '45?

A. My wife, myself and our two sons.

Q. Under what designation is it a partnership?

A. Noel Anderson & Sons.

Q. And was any other work done by any other agency or individuals on that ranch during the entire season '45 other than what was done by the partnership Noel Anderson & Sons?

A. We had a hired man.

Q. Well who was the hired man working for?

A. Noel Anderson & Sons. [119]

Q. Each one except Noel Anderson, Jr., contributed their services during '45 to the farming operation? A. That is right.

Q. And Noel Anderson, Jr., as you already testified, contributed to the preparation of the crop and

(Testimony of Noel Anderson.)

with seeding of the crop for '45 in '44 prior to his entry into military service?

A. That is correct.

Mr. Lewis: If the Court please, I think that is all at this time but I would like to have the right to put Mr. Anderson back on the stand later on.

The Court: You may proceed with your cross-examination.

NOEL ANDERSON

Cross-Examination

By Mr. Bowen:

Q. Mr. Anderson, I don't believe it was brought out on direct about your formal schooling and education; would you care to state briefly what that was?

A. I had the equivalent of high school education.

Q. And you noted on direct that you were married in '25? A. That is right. [120]

Q. And by '35 you had two of the three children?

A. Our last child was born in August, '35.

Q. So you had the four children in '35?

A. We did.

Q. In '35 you had been on the ranch of A. E. Anderson since '17, a period of 18 years, is that correct? A. Most of the time.

Q. Could you give us your best recollection of the nature of the managerial duties that you assumed beginning in '35?

Mr. Lewis: Just a minute. If the Court please, that is objected to on the ground that the Bureau of

(Testimony of Noel Anderson.)

Internal Revenue has already passed on the validity of the partnership of A. E. Anderson & Son. I don't know why it would be material.

The Court: Well I think on direct examination you have covered that ground as to his activities and what he did and so forth, and that being the case, I think counsel would have a right to cross-examine on such matters as you brought out on direct examination; perhaps it wasn't material in either event, but you brought it out and I think he should cross-examine. Do you recall the question?

A. No. [121]

(Question read):

Q. Could you give us your best recollection of the nature of the managerial duties that you assumed beginning in 35?

A. I assumed no managerial duties; my work was to do the field work, the rough work.

Q. How old was your father in '35?

A. In '35 he would have been 61 years old, I believe.

Q. What was the condition of his health at that time? A. His health was good at that time.

Q. Did your mother contribute to the normal chores that a housewife would contribute to as of that time on a ranch? A. She kept the house.

Q. She did no, she didn't aid in the ranch chores or farm chores? A. She did not.

Q. Did she at an earlier time?

A. She never did.

Q. She never did aid in ranch chores or farm chores of any kind? A. No.

(Testimony of Noel Anderson.)

Q. Was her health bad? A. Help?

Q. Her health, was it bad at that time or at an earlier date in '25? [122]

A. Her health was not good.

Q. Do you have brothers?

A. I have no brothers.

Q. You said, I believe, on direct, Mr. Anderson, that you made your home on the ranch until the fall of '48? A. '38.

Q. In '38 you moved to town?

A. Yes, moved the family.

Q. Well the family lived in town through the year in issue, '45? A. During the school year.

Q. Mrs. Anderson lived there during the school year? A. Yes.

Q. Did she live there during the summer months? A. She did not.

Q. Isn't it true, Mr. Anderson, that beginning in '38, at which time you left the ranch and moved to town that you hired a hired man and his wife to take over the ranch?

A. Not to take over the ranch.

Q. To take over the ranch and the chores and to live at the ranch and care for the house?

A. To work on the ranch, yes.

Q. Did not that woman do the cooking at the ranch from '38 to and including '45? [123]

A. We had various different couples there and the women folks would do the cooking, helped with the cooking.

(Testimony of Noel Anderson.)

Q. You have testified that your two boys, Noel and Robert, contributed to work on the ranch, did they do anything that any other farm boy in this area would do, anything more than any other farm boy would do in this area?

A. Probably not but they did it.

Q. Returning for a minute to your discussion, to your purported discussion in '44 with Mr. Lewis, you stated that the discussion related to the legal consequences of forming a partnership, what do you mean by legal consequences?

A. I believe I stated legal aspects.

Q. What legal aspects did you have in mind?

A. Well the way he answered the question was that if a partnership was formed and operated in good faith, he could see no objection to it.

Q. I see, if the partnership were formed and operated in good faith, he would see no objection to it. For what purpose? Who would object to it. Who did you have in mind as possibly making an objection to it, the Bureau of Internal Revenue?

A. Possibly. [124]

Q. Were you concerned at that time with the high and increasing surtax rates which were brought about by the increased spending due to our war effort at that time? A. I probably was.

Q. You were then conscious of the tax saving that would result if you could split your income between the members of your family?

A. I certainly was.

(Testimony of Noel Anderson.)

Q. That was a consideration in forming this partnership? A. It was one of them.

Q. What other?

A. Other and all important fact was that our boys wanted to farm. I needed their help in operating the farm and I could see no reason why I could not offer them something better than wages for their services on that ranch. They can go any place in the United States and draw wages.

Q. In '44 at this purported conference with Mr. Lewis had you consulted anyone whom, when you allegedly decided at that time this partnership allocation you proposed should be made 1/3 to yourself, 1/3 to your wife and 1/6 to each of your boys?

A. I hadn't consulted him at that time, no. [125]

Q. We were a little confused on direct, Mr. Anderson, with the chronological activities beginning with your father's death in December of '43. Could you state in your own language briefly what happened beginning with your father's death in '43?

A. I remember that my mother petitioned for letters of administration. She was appointed administratrix of the estate, and early in the year of '44 I got together with my mother and sister and discussed the proposition of buying their interests in the estate property.

Q. Was there any misunderstanding at the time as to what share of the estate should go to you and what share should go to the other two heirs of your father, they being your mother and your sister?

A. There was some misunderstanding.

(Testimony of Noel Anderson.)

Q. Then this misunderstanding possibly contributed to the fact that your father's estate was in the process of probate from December, '43, to August, '46, a period of nearly 30 months, could that have contributed to the length of time?

A. I don't think so. The agreement was made quite a long time prior to the date of final distribution.

Q. Are you aware, Mr. Anderson, of a statute in Montana requiring you to have in writing any agreement relating to the transfer of land? [126]

Mr. Lewis: That is objected to as improper cross-examination, also calling for a conclusion of the witness on a question of law.

The Court: Yes, I think so, sustain the objection.

Mr. Bowen: May I state that differently, your Honor?

Q. You have just suggested, Mr. Anderson, that in '44 you considered the over-all facts of a family operation of the farm, you had the benefit of counsel at that time, did you not? A. Yes.

Q. Were you counseled as to the need of a written agreement for——

Mr. Lewis: That is objected to for the same reason; it is improper cross-examination; that matter was not gone into at all, and it is also calling for a conclusion of the witness.

Mr. Angland: May it please the Court, I don't think it is. He says the agreement with his sister and mother was made in '44, and he has offered in evidence deeds dated '46, and we are trying to find

(Testimony of Noel Anderson.)

out whether there was a partnership in existence that included these lands that weren't deeded until '46.

Mr. Lewis: Well if you would ask that question instead of arguing questions of law with him, all right. [127]

The Court: Question him in that way then.

Q. Then was there anything in writing, Mr. Anderson, as of '44 whereby you agreed to purchase the respective interests of your mother and your sister? A. There was nothing in writing.

Q. So apparently the situation in '44 and until this purported agreement was consummated in '46 was in an executory stage, by that I mean you intended in the future to effect purchase of their respective interests, and you intended in the future to transfer your interests in part to your sons and in part to your wife, is that correct? You didn't have anything to transfer in '46, did you; that at least you didn't have anything that then was owned by the two heirs other than yourself? A. No.

Q. Mr. Anderson, I believe the record will show that the purchase price of these 1/6 interests of your father's estate purchased by you evidenced by the deed in '46 and purchased by you from your sister and your mother, the purchase price was $9,000.00, is that correct? $9,000.00 plus?

A. That was 1/3; $9,000.00 plus.

Q. You paid $9,000.00 each to your mother and to your sister for their 1/6 interest, isn't that correct? A. That is correct. [128]

(Testimony of Noel Anderson.)

Q. That is correct, on or about $9,000?

Mr. Lewis: If the Court please, I don't think that is a fair question. The testimony on direct examination was he bought 1/3 and paid for it and then counsel is trying to get the witness to say there is another 1/6 interest.

Mr. Bowen: I believe the deed will sustain this was a total of two 1/6 interests owned each by the widow, Mrs. Anderson, the mother, and his sister.

Mr. Lewis: The part of the property included in this deal was all owned by A. E. Anderson, the whole Kingsbury ranch.

The Court: Well let's not argue about that, if there was a separate consideration for the 1/6 interest of the mother and sister.

Q. (By Mr. Bowen): What I am getting around to, Mr. Anderson, is this, yet although you paid $9,000.00 each for those respective interests, you sold the same or you purported to sell or agreed to sell in '45 the same interests to your sons for $75,000.00; how do you account for that discrepancy?

A. There was some difference in the inventory on that property. [129]

Q. As I recall the deed dated May 15, 1951, at which time you transferred the real property, the 1/6 interest to your son refers to known properties, the only reference there, and the exhibit speaks for itself, is to real property therein described. Could it be that maybe there had been a decline in real estate value, would you suggest that, in '45?

(Testimony of Noel Anderson.)

A. No.

Q. Did you have any understanding with your sons about payment as of a certain date or were they allowed just to pay when they could?

A. The agreement was that they would pay for their interests out of their earnings in the partnership.

Q. If there were losses, of course, they would not be accountable for any payment to you?

A. That is right, share and share alike.

Q. It has been brought out on direct, Mr. Anderson, about the presumably adjustment and addition to the income of the partnership in '45 of some $11,000.00 taxable to you as your 50 per cent share of the income earned by A. E. Anderson & Son; you recall that, do you not? A. I do.

Q. Do you recall then a conference which was the upshot of that adjustment and was the upshot of this alleged partnership agreement? Do you recall then a conference in April, '47, when Revenue Agent Roy M. Crismas—— A. I do. [130]

Q. You do recall that conference?

A. Yes.

Q. Do you recall at that time an offer made by you in order to settle the additional tax liability which you asserted that you would agree to a 50 per cent allocation of income to you if he would in turn agree to 25 per cent allocation each to your two sons, Noel and Robert?

Mr. Lewis: Just a minute. That is objected to as

(Testimony of Noel Anderson.)

being improper to; any offer of compromise that wasn't followed out is not admissible in evidence.

The Court: Sustain the objection.

Mr. Bowen: Your Honor, what I intend to show by that is not so much the truth of the allegation asserted but to show as a matter of fact that he would presumably have the control and domination of the alleged family partnership, which would allow him to enter into such a——

The Court: If they had discussions as to a compromise, proposed settlement and it wasn't carried out that wouldn't be allowed in evidence I don't think; that has been the rule for a long time those compromises should be eliminated. They were not carried out apparently.

Q. (By Mr. Bowen): You state, Mr. Anderson, that in '45 one of the reasons that you contributed this $11,000.00 to Noel Anderson & Sons partnership was because they needed [131] money to operate. Do you recall that statement? They had no money and this $11,000.00——

A. I can't recall that I made that statement.

Q. It has been brought out on direct that Robert had certain withdrawals credited to his account on this partnership account book for '45, is that correct, Mr. Anderson? A. That is correct.

Q. Do you remember how those withdrawals were made?

A. They were made in the form of checks issued to them.

(Testimony of Noel Anderson.)

Q. Those checks were drawn by you, were they not? A. They were.

Q. On your joint account with your wife, Mrs. Anderson, were there any other withdrawals by members of your family in '45 other than Robert?

A. From the partnership income, you mean?

Q. In the money or partnership income?

A. Yes, there were.

Q. There were? A. Yes.

Q. To whom were those distributions made?

A. To my wife and myself.

Q. That appears in your account book?

A. It does.

Q. How were they made to your wife?

A. Made in the form of deposits to our joint account. [132]

Q. Getting back again, Mr. Anderson, to the conference in April, 1947, between you and Mr. Roy M. Crismas, the revenue agent, do you recall his requesting of you all the books of accounts, books and accounts of the purported Noel Anderson & Sons partnership? That would be a normal request that any agent would make on the audit of a purported partnership.

A. I don't recall if he made a request for all books or not.

Q. Do you recall what books were made available, if any, to him at that time?

A. I can't remember but I am quite sure he had the farm account book.

(Testimony of Noel Anderson.)

Q. On examination of Exhibits 25 and 26, which were those Commodity Credit Corporation contracts, which purported to be those contracts, then we agree as we were attempting to then that because the call date was 12/31/46 that payment would have to be made subsequent to that but in accordance with the C.C.C. contract?

A. Payment was made subsequent to that date.

Q. Sometime in '47?

A. The check came to me in '47.

Q. We have just covered testimony, Mr. Anderson, relating to the alleged intent back in '44 to transfer to the partnership certain lands leased from the State of Montana, you recall that statement? Strike that question.

Mr. Angland: I think the Court rules [133] those exhibits were excluded.

Mr. Bowen: They were.

Q. (By Mr. Bowen): Mr. Anderson, did you make out the federal income tax returns of yourself, your wife and your two sons in '45?

A. Mr. Lewis made those.

Q. He made them out with your aid?

A. That is right.

Q. Did you sign returns other than your own for the year '45?

A. I probably did. Noel J. Anderson was not there at the time the return was made.

Q. Do you recall signing you say your son Noel's and your son Robert's income tax return?

(Testimony of Noel Anderson.)

A. Robert was at college. I don't recall signing it but I might have.

Q. Does this refresh your recollection? That is your signature on both those returns, is it not?

A. That is correct.

Q. Do you recall how the income tax reported as due on their returns, on your return and your wife's return was paid for '45? The income tax as returned originally do you recall how that was paid, was it paid by your check?

A. I don't recall just how it was paid; all I know it was paid. [134]

Q. You don't deny that it was paid by your check?

A. I believe it was paid from the joint account.

Q. Of you and Mrs. Anderson?

A. That is correct.

Q. Is it customary for you to pay the income taxes of your sons? A. It is not.

Q. But you did?

A. It was charged against them.

Q. Is it customary for you to sign their returns?

A. No, when they are available to sign them themselves.

Q. Do you recall making application back in the years in issue or the years immediately thereafter, '46 and '47, for gas refunds with the State Board in Helena?

A. I probably did. We haven't made an application for refund for several years.

(Testimony of Noel Anderson.)

Q. Do you recall in whose name it was made, this application? A. I don't recall.

Q. To refresh your recollection, does this, sir, help you? Do you deny that application was made in your name in '45, '46 and '47?

A. I can't deny that.

Q. Will you, Mr. Anderson, draw out a rough diagram of cattle brands, if any, registered in your name or in your family's name during the years in issue? In the name of A. E. Anderson, Noel Anderson or Noel Anderson & Sons. In other words, that is brands registered in [135] the name of your family, will you draw out their holdings?

A. Yes.

Q. How would you describe those brands to an Easterner, or to anyone for that matter?

A. I would describe the one brand as "Heart Lazy A" with quarter circle underneath; and the other brand as "X hanging K", I would call it.

Q. X hanging K. And those are the only two brands recorded in the name of your family?

A. That is right.

Mr. Bowen: I would like to introduce that in evidence.

Mr. Lewis: What is the purpose. I would object to it unless it is connected up with something else.

Mr. Bowen: The purpose is to show that registration of these two brands was continued through the year in issue in the name of A. E. Anderson or Noel Anderson and immediate succeeding years; June 5, 1951, for the X hanging K and June 5, 1951, for the Heart Lazy A quarter circle.

(Testimony of Noel Anderson.)

Mr. Lewis: That is objected to unless counsel will agree that although happening since '45 it has something to do with the '45 partnership. Now we are right on the other side of the fence from where we were a while ago. Now if you will agree or are ready to agree to allow that evidence to go in between '45 and the [136] present time as to what happened in this partnership, then I will not object to that; but if you are not going to allow the other evidence to go in, then I will object to this as being improper cross-examination, too.

Mr. Bowen: I think we could meet the objection two ways, your Honor. We are showing, first, the continuity of the ownership of this brand beginning with May 8, '43, when it was in the name A. E. Anderson as of October 3rd, '46, when registered in the name Noel Anderson; remember, they argue the partnership existed as of January 1, '45, yet the brand name was registered in the name Noel Anderson, October 3rd, '46, which is inconsistent with their allegation, and not until June 5, '51, as to the X Lazy K brand and June 2, '52, on the Heart Lazy A quarter circle A brand was it recorded in the Noel Anderson & Son partnership name. It seems to me the line is clear, it continues through the year in issue and shows that not until '51 and '52, respectively, was there a change in the registration of the brand.

Mr. Lewis: The objection is further that it makes no difference anyway as to whose name the brands may have been in. It makes no difference

(Testimony of Noel Anderson.)

as far as the case is concerned if all of the property appeared to be in the name of Noel Anderson as to the validity of the partnership. We have decisions galore along this line to the effect that the title to any property is not conclusive as to whether it was a partnership or not, and [137] what may have happened in the last year or two would have nothing to do with the case under counsel's interpretation of it.

Mr. Bowen: Your Honor, he misconstrues our objections. We objected to the showing of what happened in '47 and '48, '49, '51, and '52 a while ago because he did not trace the relevancy of that particular exhibit to '45; on the other hand, there is clear continuity and clear casual connections made herein and offered.

The Court: Well, I will allow it to go in for whatever it is worth. Overrule the objection.

The Court: I think we had better suspend here. Court will stand adjourned until tomorrow morning at 10:00 o'clock. (5:05 p.m., 12/11/52.) [138]

(Court resumed, pursuant to adjournment, at 10:00 o'clock a.m. on December 12, 1952, at which time counsel and parties were present.)

The Court: Good morning, gentlemen. You may proceed.

NOEL ANDERSON

resumed the stand and testified as follows:

Cross-Examination
(Continued)

By Mr. Bowen:

Q. Taking up, Mr. Anderson, where we left off yesterday with our discussion of livestock brands in the names of the Anderson family, I believe it was established that the Anderson family had only two brands, is that correct? A. That is correct.

Q. The X hanging K and the Heart A quarter circle? A. That is correct.

Q. You had sales of cattle transactions in '45, did you not? A. Yes.

Q. Do you recall in whose names those sales transactions were executed?

A. The cattle brands were in my father's name.

Q. The cattle brands were in your father's name in '45? A. That is right. [139]

Q. That continued throughout all the year?

A. The year of '45, yes, sir.

Q. Does this document reflect to your best recollection the sequence of recordations of your family's brand name with the State Livestock Commission? There are two documents there.

A. There is one date here that is not correct.

Q. What is that date, Mr. Anderson?

A. June 5th, '52, with reference to the Heart Lazy A quarter circle brand.

Q. And what is that reference, Mr. Anderson?

(Testimony of Noel Anderson.)

A. I have brand as rerecorded here in a document showing a date of June 5th, '51.

Q. And this paper that I have handed you shows it recorded when?

A. Shows it recorded June 5th, '52.

Q. And you had '51?

A. On this document.

Q. But the references other than the part Heart Lazy A quarter circle for '52 are correct then to the best of your knowledge? A. They are.

Q. Then is it true, Mr. Anderson, that during the year '45, any cattle sales, of which I believe you report nearly $4,000.00 in the partnership return for '45, all of those cattle sales would have been made in the name of A. E. Anderson & Son, is that correct, in order to transfer title in accordance with the brand registration? [140] To pass good title you would have had to make the transaction in the name of A. E. Anderson and Son, isn't that true?

A. The brand is recorded in the name of A. E. Anderson and the title is not transferred at that time.

Q. The title to cattle? A. Was not.

Q. The sale of which occurred in '45?

A. They were sold at the market, livestock market, and the returns came to the A. E. Anderson Estate, I believe.

Q. In other words, the sales made of cattle which you reported on the partnership return of '45, which sales total approximately $4,000.00, were

(Testimony of Noel Anderson.)

made in the name of A. E. Anderson, is that correct? A. The brands were recorded.

Q. As recorded with the State Livestock Commission in Montana? A. That is right.

Mr. Bowen: Your Honor, I submit these in evidence, the portion that relates only to the year '45 because we see that according to Mr. Anderson's testimony the reference with regard to the brand Heart Lazy A quarter circle, June 5, '52, the reference that on that date the brand name was first registered in the name of Noel Anderson & Sons should have been corrected to June 5, '51. Is that your understanding? A. That is right. [141]

Mr. Bowen: With that correction then I submit these in evidence.

Mr. Lewis: To which we object, if the court please, as not the best evidence unless counsel will agree to accompany it with the original brand certificate which is the best evidence of what is reported, and further I would like to inquire, first, if the court please, to make sure if this represents the correct record.

The Court: I suppose there will be no objection to submitting the original certificate of brand, if they have it.

Mr. Lewis: Do you propose to submit the original?

Mr. Bowen: No, I propose you do it.

Mr. Bowen: Do you have those with you?

A. I do not.

(Testimony of Noel Anderson.)

Mr. Bowen: You have only the one relating to the year '51?

Mr. Bowen: That is when the brand was recorded and transferred to Noel Anderson & Sons.

Mr. Bowen: In answer to his objection, your Honor, the witness himself has testified to the validity of what is shown on those two exhibits which are certified. I don't see that any more has to be shown to substantiate the truth.

The Court: I think so. I will overrule the objection and admit the exhibits. (Nos. 34 and 35.) [142]

Q. Mr. Anderson, you touched briefly on direct examination on the sale of wheat in your family name in the year '45; do you recall with whom you transacted your wheat sales largely at that time, what elevator company?

A. It would probably be with the Greeley Elevator Company and the General Mills.

Q. A substantial amount of your business was transacted with Greeley Elevator?

A. I believe so; I am not sure.

Q. Isn't it true that they have three stations in the vicinity of your ranch, Loma Station, Fort Benton Station and Highwood Station?

A. You say Highwood?

Q. Yes, sir. A. That is correct.

Q. And if you transacted business with the Greeley Elevator Company, you would have probably done that through either of those three stations? A. One or two stations, normally.

Q. Which two more than likely?

(Testimony of Noel Anderson.)

A. Loma and Virgil.

Q. Do you recall in whose name in '45 you executed wheat sales? You may refresh your recollection.

A. You are referring to the year '45 now?

Q. The year '45, yes, sir, the year in issue.

A. It appears here that wheat was sold in my name and the name of A. E. Anderson & Son. [143]

Q. Is that correct to the best of your knowledge?

A. If that is a record, to the best of my knowledge it is correct.

Q. Did you sell any wheat during the year '45, the year in issue in the name of Noel Anderson & Sons? A. Not in the year '45, I don't think.

Q. You transacted business with the Triple A office in Fort Benton during the year '45, did you not? A. Yes, I think I did.

Q. What is the nature of the business that a farmer and rancher in Fort Benton would transact with the Triple A office?

A. A farmer who was in the program will sign up with the program.

Q. I see, by signing up the program you mean signing up with the Triple A program for wheat benefits? A. That is correct.

Q. What is the nature of those benefits as far as you are concerned?

A. Well, some of the practices or benefit payments are for strip cropping, reservoir building.

Q. So if you agree to plant your wheat accord-

(Testimony of Noel Anderson.)

ing to this Government scientific method, then you get certain cash benefits for that, is that correct?

A. That is correct. [144]

Q. And also if you restore or preserve your land by building dams, you get benefits for that?

A. That is correct.

Q. You report in your '45 partnership return an expense incurred in the building of a dam, is that correct? A. Yes.

Q. Was that expense incurred and carried to your knowledge with the Triple A office in your name or the name of A. E. Anderson & Son?

A. I believe it was A. E. Anderson & Son.

Q. To your knowledge was any business carried on with the Triple A office in the name of Noel Anderson & Sons? A. Not in the year '45.

Q. Was any business carried on in '45 with the Triple A office in your name? To the best of your recollection. I know that is a long time ago.

A. Not that I can remember.

Q. The only business then carried on with the Triple A was with reference to strip planting and conservation programs would be in the name of A. E. Anderson & Son?

A. I believe that is correct.

Q. Turning again, Mr. Anderson, to the year '45, do you recall in whose name State property taxes were paid of your family property to the State of Montana through the County Treasurer's office in Fort Benton? [145]

A. Estate taxes, you say?

(Testimony of Noel Anderson.)

Q. That is right. I don't mean estate; State of Montana taxes. I mean, Mr. Anderson, County of Chouteau, not State of Montana taxes, in whose name were those taxes paid in '45 on the family property?

A. I believe they were paid in the name of A. E. Anderson & Son.

Q. That was consistent with the manner in which deeds to the property were registered at that time, is that correct? Deeds to the family property were recorded?

A. No, the deeds were in my father's name. The taxes on this property were paid as a part of the expense of operation of the partnership of A. E. Anderson & Son.

Q. Were any taxes paid in the name of Noel Anderson & Son in '45? A. I think not.

Mr. Bowen: No further questions, your [146] Honor.

NOEL ANDERSON

Redirect Examination

By Mr. Lewis:

Q. Mr. Anderson, you stated on cross-examination that you made certain cattle sales in '45?

A. That is correct.

Q. And you received the proceeds of those sales, did you? A. Yes.

Q. Now, where did you place the credit for the proceeds of those sales on the books on your account books and on the income tax return?

(Testimony of Noel Anderson.)

A. They were credited to the A. E. Anderson & Son account.

Q. In the bank?

A. In both the bank and in the farm account book.

Q. For '45? A. For '45.

Q. Were any part of those proceeds reported on the amended return as being proceeds from the Noel Anderson & Sons partnership that year? I had better let you see the return.

Mr. Bowen: Your Honor, that return is in evidence; it speaks for itself. In the interest of time he is duplicating.

The Witness: May I back up on that statement?

Mr. Lewis: Certainly. If you want the exhibit to refer to, you may have it. [147]

A. The proceeds from the sale of cattle for '45 were deposited to the A. E. Anderson & Son account but they were entered in the farm account book of Noel Anderson & Sons.

Q. And how were they reported in the income tax return?

A. They were reported as income of Noel Anderson & Sons.

Q. Were there any sales in '45 of cattle belonging to the A. E. Anderson & Son partnership?

A. Not in '45.

Q. You say these sales were entered on your books as receipts for Noel Anderson & Sons and were so reported in the income tax return?

A. That is correct.

(Testimony of Noel Anderson.)

Q. Now you stated in your cross-examination that you did not believe that any wheat, '45 wheat sold in '45, was sold in the name of Noel Anderson & Sons? A. That is correct.

Q. Now, was there any '45 wheat sold in the spring or during the year of '46 in the name of Noel Anderson & Sons? A. There was.

Mr. Angland: I think that is repetition, your Honor. It is repetitious. I believe he went into that yesterday on direct. [148]

The Court: Well, it is redirect and reiterating some of it.

Q. And in whose name was the—I believe you testified, Mr. Anderson, that the real estate was in the name of A. E. Anderson during '45, during '44?

A. That is correct.

Q. Now, what is the policy, if you know, in matters having to do with the Conservation Office with reference to applications, for instance, for a dam, are the applications made considerably in advance?

A. Yes, they are.

Q. And do you recall whether or not this application for this conservation work which involved this dam was made in '44 or talked over in '44?

A. If the dam was built in '45, it was applied for in '45.

Q. Now in '45 you showed on the return of Noel Anderson & Sons the payment of work on dam, did you not? A. That is correct.

Q. And was that labor, expended, performed and paid for by the firm of Noel Anderson & Sons?

(Testimony of Noel Anderson.)

Mr. Angland: Just a minute. That is the very question in issue, your Honor, is whether or not there was a Noel Anderson & Sons in existence in '45. It is admitted that he submitted his return showing those charges to what he alleges as a partnership in '45. [149]

Mr. Lewis: I will be glad to withdraw the question and rephrase it.

Q. Mr. Anderson, was the labor performed as shown there a part of the expense of the farming operations of Noel Anderson & Sons during the year '45? A. That is correct.

Q. And was it so entered on your account books?

A. It was.

Q. And so entered in the return?

A. That is correct.

Q. Now, Mr. Anderson, was there during the year '45, as you stated the ownership, the title to the lands were in the name of A. E. Anderson?

A. That is correct.

Q. And did you pay taxes on those lands in '45?

A. Yes, I did.

Q. Now, Mr. Anderson, you, of course, paid those taxes with checks on the account of A. E. Anderson & Son, is that right?

A. That is correct.

Q. And I believe you testified yesterday that that was the only bank account so far as your business was concerned during the years '44 and '45 and up to May 1st, '46, is that correct?

A. That is correct. [150]

(Testimony of Noel Anderson.)

Q. So that all of the expenses of the partnership of Noel Anderson & Sons so far as the payments were concerned were made out of that one account?

A. That is correct.

Q. And I think you testified yesterday, did you not, that that account carried business for the partnership of A. E. Anderson & Son which was being closed up and it carried business, some business for the estate, and it carried some business for Noel Anderson & Sons, is that correct? A. Yes.

Mr. Angland: Just a minute. We will object to any further questioning along this line, it is repetition.

The Court: This is not redirect. This is repetition of the testimony of the witness in chief.

Mr. Lewis: Yes, if the court please, but I am getting to the point of property taxes and that is my next question.

Q. Now the property taxes that were gone into on cross-examination, where were those taxes charged on your books, against whom?

A. For the year '45?

Q. Yes.

A. They were charged against the partnership of Noel Anderson & Sons. **[151]**

Q. And was it a part of the regular expense of the partnership? A. It was.

Mr. Angland: I am going to move to strike, your Honor, the last two questions and the last two responses. The witness is testifying from an exhibit

(Testimony of Noel Anderson.)

which is in evidence, the partnership return filed by Noel Anderson & Son, the very matter that must be determined by the court was whether or not it was in fact a partnership. It is merely repetition. It is merely incumbering the record.

The Court: Well, we will let it stand if he quits now, but if he continues to restate the case and reintroduce the evidence in chief, why, we will have to stop him.

Mr. Lewis: I think that is all on redirect.

Mr. Bowen: Your Honor, one question.

NOEL ANDERSON

Recross-Examination

By Mr. Bowen:

Q. You state, Mr. Anderson, in regard to the dam expense incurred in the year '45 that it was carried on your partnership return as expense of Noel Anderson & Sons; how was that expense paid?

A. The expense was paid by a check on the A. E. Anderson & Son account. I believe it was paid to the P.M.A. office and they in turn paid the contractor.

Mr. Bowen: No further questions. [152]

The Court: Call your next witness.

Mr. Lewis: May I inquire of Mr. Anderson a few questions on——

The Court: On what?

Mr. Lewis: I asked for a reservation to be permitted to put Mr. Anderson on the stand again,

after I took him off yesterday, and there were a few questions I would like to ask him further.

The Court: You mean to put him back and examine him in chief?

Mr. Lewis: That is right.

The Court: On matters you haven't brought out before?

Mr. Lewis: That is right.

The Court: Well, all right, go ahead, and be as brief as you can.

NOEL ANDERSON

resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Lewis:

Q. Mr. Anderson, on what bank account did you pay the expenses of the partnership of Noel Anderson and Sons beginning with May 1st, '46?

Mr. Angland: That is objected to, your Honor, as repetitious. [153]

The Court: Didn't you go into that yesterday?

Mr. Lewis: If the court please, we are back where we were and it is my purpose now to introduce some exhibits showing what occurred in '46, too, from '45.

The Court: Exhibits you offered in evidence yesterday?

Mr. Lewis: No, not that I offered in evidence yesterday.

(Testimony of Noel Anderson.)

The Court: All right, show your exhibits to counsel and let's try and dispose of this.

Mr. Angland: If they are connected with '45, and there is a continuity, I will advise counsel and this court we are not objecting if there is continuity. This first one is Ragland Grocery, May, '46. There isn't anything to show that Noel Anderson & Sons partnership transacted business with the Ragland Grocery in '45. Now a continuity we will not object to. We desire to submit '45 and not go into '46 and attempt to have that transaction relate back to prove the existence of something in '45. That is our objection to it.

The Court: Well, that is a proper objection.

Mr. Angland: That is the first one tendered to us and that is the only one I have noted, a '46 check to Ragland Grocery. Of course, the witness testified he did the business in the name Noel Anderson & Sons. [154]

The Court: Does this check show it?

Mr. Angland: Not in '45; it shows a transaction in '46.

Q. (By Mr. Lewis): Mr. Anderson, did the firm Noel Anderson & Sons do business with the Ragland Grocery Company in Fort Benton during the year '45? A. They did.

Q. And was that business continuous through the year '45? A. It was.

Q. And was it continuous then beginning with the year '46? A. It was.

Q. And up to May 1st and after in '46?

(Testimony of Noel Anderson.)

A. It was.

Mr. Lewis: I will have this marked.

Q. I hand you Plaintiff's proposed Exhibit 36 and ask you if you recognize it? A. I do.

Q. What was that given for?

A. That was a check given to Ragland Grocery for the April account.

Q. Of Noel Anderson & Sons?

A. And was paid from the account of Noel Anderson and Sons. [155]

Mr. Lewis: I am offering it in evidence now.

Mr. Angland: Well, we are going to have to object. Now this is an attempt after the establishment of a bank account by Noel Anderson & Sons in '46 a check was issued by that firm. Yesterday a witness was called out of order without objection on our part to permit him to testify concerning dealings with the Ragland Grocery; he could produce no evidence, documentary evidence, to show dealings in '45. It is admitted that the witness has testified he did business with the concern in '45; he says he did business with it in '46, so we give the same weight to the plaintiffs in '45 and '46 by his statement and by documentary evidence in '46 to prove there were transactions in '45 without any evidence.

The Court: I will sustain the objection.

Mr. Lewis: If the court please, yesterday there were certain leases offered in evidence and the court suggested if the assignments were assigned up to previous leases, they might be admissible. We now

(Testimony of Noel Anderson.)

have the leases that were assigned by those assignments and I would like now to inquire as to Plaintiff's Exhibits No. 29 and No. 28, which I wish to include as not only the assignment but the lease attached to it. [156]

Q. (By Mr. Lewis): Mr. Anderson, I hand you Plaintiff's proposed Exhibit 29. How many State land leases, Mr. Anderson, did you have, did the old partnership of A. E. Anderson & Son have from the State of Montana?

A. I believe there were six separate leases.

Q. And in whose name were those leases at the time of the old partnership before the death of your father?

A. One large lease was in the name of A. E. Anderson and Son and the other leases were in the name of A. E. Anderson.

Q. Now, do you know what the expiration dates of those leases were in January?

A. The expiration dates varied.

Q. And over what time did they stretch?

A. Well, from, I believe the expiration date strings from '39 to '52, probably '53.

Mr. Angland: Mr. Lewis, possibly we can save you time and the time of the court. Do you have leases that were in existence in '45 and you are carrying them on through concerning assignment dates and all. We may stipulate that they all go in?

Mr. Angland: Mr. Lewis, I want to be absolutely fair in this matter. We are going to agree and will agree now it's been admitted in evidence they tend,

(Testimony of Noel Anderson.)

I think they tend to disprove the Plaintiff's case. They show assignments were made in '47. [157]

The Court: Has he offered them in evidence?

Mr. Lewis: Yes, they were marked Plaintiff's Exhibit 29.

The Court: You offer them in evidence?

Mr. Lewis: Yes, I do.

The Court: Any objection?

Mr. Angland: No.

The Court: They may be received in evidence. Proceed to something else.

Q. (By Mr. Lewis): Mr. Anderson, there are other leases and I hand you now Plaintiff's proposed Exhibits 30 and 31 and ask you whether or not those two were renewals of leases that were in existence in the name of either A. E. Anderson or A. E. Anderson & Son? A. That is correct.

Q. And were they direct renewals at the expiration of those other leases?

A. That is correct.

Mr. Lewis: We offer these in evidence.

Mr. Angland: What is the date? We will object to offer of proposed Exhibits 30 and 31 by the plaintiff.

The Court: What are they?

Mr. Angland: They are lease of State lands, No. 30, dated February 28, '49, wherein the State of Montana leased to Noel Anderson & Sons; and plaintiff's proposed Exhibit 31, dated February 28, '52, showing [158] that a lease was entered into by

(Testimony of Noel Anderson.)

the State of Montana with Noel Anderson & Sons. They are too remote.

Mr. Lewis: He has testified, if the court please, they were renewals of the written leases.

Mr. Angland: They would have to be renewals of leases with Noel Anderson & Sons to be a renewal, a lease in existence with Noel Anderson & Sons in '45.

Mr. Lewis: May I be permitted to ask another question to clear this up?

The Court: Yes.

Q. Mr. Anderson, prior to the renewal of these leases were the leases they renewed assigned to Noel Anderson & Sons? A. They were.

Q. Were they assigned on March 15th, '47, the same date as these others?

A. On March 15th or thereabouts.

Mr. Angland: We will object to that as being too remote to be material. There was no lease in existence between Noel Anderson & Son in '45.

The Court: Sustain the objection. Proceed.

Mr. Angland: Mr. Lewis, you don't need to identify that.

Mr. Lewis: All right.

Mr. Angland: This is Plaintiff's proposed Exhibit 31 in the matter of the estate of Andrew E. Anderson and we have no objection for whatever value it has. [159]

Mr. Lewis: We offer it in evidence.

The Court: All right, it may be received in evidence.

(Testimony of Noel Anderson.)

Q. (By Mr. Lewis): Mr. Anderson, how long were you a partner of A. E. Anderson & Son?

A. From the year '35 up to and including the year '44.

Q. And during that time was all of the property of A. E. Anderson & Son in the name of A. E. Anderson? A. It was.

Q. And was the bank account in the name of A. E. Anderson? A. It was.

Q. And was a good deal of the business, was or was it not, conducted by A. E. Anderson?

A. It was.

Q. And that was true up to the time of the death of A. E. Anderson? A. That is correct.

Q. Now, when you took your steps to organize Noel Anderson & Sons partnership and after it was organized for the first year or more, did you consult any attorney with reference to any of the details of how it was handled? [160]

A. I consulted you.

Q. Did you or did you not transact a great deal of the business of Noel Anderson & Sons business in the first year of its existence either in the name of A. E. Anderson & Son or Noel Anderson?

A. That is correct.

Q. Well, how did you happen to do that?

A. As far as I was concerned the name was of minor importance to me. There was only one bank account in existence, the account of A. E. Anderson & Son; as far as the name or the name in which the

(Testimony of Noel Anderson.)

business was transacted that was of minor importance to me.

Q. Now, was that the situation in your business relations with the Fay Adams Implement Company? A. That is correct.

Q. During the period immediately after your father's death and on through for, until after the decree of distribution was entered in your father's estate? A. That is correct.

Q. Was that same situation true in your dealings with the Central Service Station in Fort Benton, if you had any? A. It was. [161]

Q. And probably with most of the other firms you dealt with, is that true?

A. That is correct; the name was not important to me.

Q. In your dealings with these various firms during this period '45, was anything very much said to any of them with reference to what name you were doing business under?

A. There was nothing said that I can recall. I didn't advertise the fact.

Mr. Angland: You didn't advertise the fact, is that your answer?

A. That is my answer, yes.

Mr. Angland: I didn't quite hear you.

Mr. Lewis: That is all.

NOEL ANDERSON

Cross-Examination
(Continued)

By Mr. Bowen:

Q. Mr. Anderson, you stated on direct just now that all the property prior to your father's death in December, '43, of the Anderson family was carried in his name, is that a correct statement?

A. That is correct as far as I know. [162]

Q. To refresh your recollection, Mr. Anderson, the inventory and appraisement of your father's estate fixed as of the date of his death has language in it of referring to an undivided one-half interest in residue real property; how do you explain that? In whose name was the other half interest carried then?

A. The property was still all in my father's name but I claimed a half interest in it.

Mr. Bowen: No further questions.

Mr. Angland: That is all.

Mr. Lewis: That is all.

MAURICE FARRELL
resumed the stand and testified as follows:

Direct Examination

By Mr. Lewis:

Q. Your name, please?

A. Maurice Farrell.

Q. I think you were on the stand yesterday and told what business you were connected with?

(Testimony of Maurice Farrell.)

A. That is right.

Q. I will ask you whether or not your firm of Fay Adams Implement Company did any business with what's termed the old partnership here, A. E. Anderson & Son? A. We did. [163]

Q. And for how long a period was that?

A. Oh, from the time I started working for them until Mr. A. E. Anderson's death.

Q. And was that a rather continuous charge account?

A. It was continuous, business every year.

Q. Now, what occurred then with reference to your dealing with the Anderson family after the death of Mr. A. E. Anderson?

A. Well, the account was just carried on.

Q. Was it continuous, was there continuous account with the Anderson family clear through?

A. That is right.

Q. And was there an account continued on through the year '45? A. Yes.

Q. Do you recall, Mr. Farrell, particularly whether the firm of A. E. Anderson or of Noel Anderson & Sons did business with you then in '45?

Mr. Angland: Just a minute now. Read the question.

(Question read.)

Mr. Angland: We would object to that. The records are the best evidence. We will agree this witness may testify from the records which were here yesterday to which Mr. Lewis objected to. We will

(Testimony of Maurice Farrell.)

be glad to permit him to testify from those [164] records.

The Court: Yes, I think so; a record of those transactions, that would be the best evidence.

Mr. Angland: We will be glad to agree he may testify from these records.

Mr. Lewis: It has been testified here that the account has been continuous, which I think cures the situation that we faced yesterday in the questions direct to Mr. Farrell. And I have a number of checks here which have been marked Plaintiff's Exhibits 15, 16, 17, 18 and 19 and 20, which I will hand to you, Mr. Farrell, and ask you to examine them and see if you recognize them, including the endorsement.

Q. Did those checks all pass through your hands, the hands of your company? A. Yes.

Q. And what were they given for?

A. They were given for merchandise purchased.

Q. And the dates run from May 4th, '46, to July 20th, '46? A. Yes.

Q. And they are all——

Mr. Angland: Just a minute. I am going to object to counsel testifying. If he wants to ask this witness questions, that is one thing, but I object to leading and suggestive questions. I think the counsel is getting into something the court ruled on cross-examination he has to have records to tie it up with '45. [165]

Mr. Lewis: I think not.

(Testimony of Maurice Farrell.)

The Court: This is the same thing you brought up yesterday.

Mr. Lewis: I think it was on the basis I had not tied up the accounts coming on from the old partnership to the new which I have done by two or three witnesses.

Mr. Angland: He is using the records as best evidence for '46 with no records for '45.

The Court: I will sustain the objection.

Mr. Lewis: That is all, you may cross-examine.

MAURICE FARRELL

Cross-Examination

By Mr. Bowen:

Q. Mr. Farrell, since the beginning of this trial and since having first been put on notice you did come on over as a witness, have you familiarized yourself with the Fay Adams records relative to the year '45?

A. Yes, sir, I have looked them up.

Q. Do you recall, did you inquire in whose name business with the Anderson family was transacted in '45 with respect to purchases?

A. Transacted in the name of Noel Anderson.

Q. The records show they were transacted in the name of Noel Anderson?

A. That is right. [166]

Q. You say that your recollection of what the records show indicate that the records show that

(Testimony of Maurice Farrell.)

in '45 you dealt with Noel Anderson, is that correct? A. That is correct.

Q. Turning again then to your recollection of what the records show, do you remember the first year that business was transacted in the name of, after '45, of any of the family members of this alleged partnership other than Noel Anderson?

A. Well, '46.

Q. You have some records that show not until '46 was there transactions with Noel Anderson & Sons? A. That is right.

Q. Would you care to turn to your records and see if your recollection is correct, Mr. Farrell? Our inquiry indicated that it was at some later date that you first began recording on your books business activities with Noel Anderson & Sons? Your first inquiry should be directed to your accounts for '46 to see if as a matter of fact they record any dealings with Noel Anderson & Sons. Just refresh your recollection.

A. This page is shown under the name of Noel Anderson only. [167]

Q. Will you turn then to—take the total record for '46?

A. No, it isn't. The prior record to this are the original slips that these charge and credit accounts are made from.

Q. Then, Mr. Farrell, when do your records, to the best of your recollection, what date do they indicate Noel Anderson & Son first opened an account?

(Testimony of Maurice Farrell.)

A. Well, I will have to look at my slips to show that, to give you the exact date.

Q. Well, could you explain this to the court, why the slips would show one thing and why your ledger account would show another thing as the subsequent years?

A. Well, this book was kept there by a bookkeeper, and the name Noel Anderson is merely identification where to put the slips.

Q. But your ledger accounts at a later date, I believe, Mr. Farrell, show the business transactions in the name of Noel Anderson & Son, isn't that right? A. Yes, it is changed.

Q. And that later date do you recall what the first later date is that you began recording business in your accounts as Noel Anderson & Sons?

A. No, I would have to look through '48, '48 or '49. [168]

Q. Will you check '47, Mr. Farrell? Do you have any entries there recording transactions in the name Noel Anderson & Sons?

A. The account itself is plain Noel Anderson.

Q. Still carried as Noel Anderson in the year '47? A. On this page, yes, sir.

Q. Will you turn to '48? How was the ledger account for the year '48 carried as reflected by your ledger? A. The name here is Noel Anderson.

Q. Still Noel Anderson. Will you turn to '49, please, sir? And what does your inquiry show?

A. This shows Noel Anderson & Sons.

Q. And for the first time then in '48 then you

(Testimony of Maurice Farrell.)

began recording the transactions in the name of Noel Anderson & Sons on that ledger account?

Mr. Lewis: That is objected to as not being definite. The question should be directed to those books, it seems to me.

Q. The inquiry of the record, what these books show, not what Mr. Farrell shows, and those books show what?

Mr. Lewis: If the court please, I don't like to object. It is clear here, and this witness testified on cross-examination, that he has other accounts which are the original entries. He has testified these are the ledger accounts. I think when we are [169] referring to ledger accounts the question should be directed to the ledger accounts.

Q. He has suggested you are to be restricted. I would like to know what the ledger accounts show in '49, in whose name is it carried in in '49?

A. Noel Anderson & Sons.

Q. Does it begin January 1st or some time during the year? A. January 4th.

Q. So then that indicates that for the first time you carried the account in the name of Noel Anderson & Sons, beginning January 4, '49, is that correct?

Mr. Lewis: Just a minute. We object to that on the same grounds that it is not definite and it is not directed towards the books the witness has testified from.

The Court: Overrule the objection.

(Testimony of Maurice Farrell.)

A. This is the first time it shows up on these pages as an identification.

Mr. Lewis: Any questions?

Mr. Bowen: No further question, your [170] Honor.

MAURICE FARRELL

Redirect Examination

By Mr. Lewis:

Q. Mr. Farrell, do you have any other records with you of your transactions with the Anderson family? A. Yes, I do.

Q. And what are those records?

A. Those are the original slips made at the time of the transaction.

Q. Will you please refer to your original slips for '45? State in whose name the slips are?

A. The slips show in the name Noel Anderson.

Q. All the way through?

A. All the way through.

Q. Now, will you please refer to the slips for '46?

Mr. Bowen: Your Honor, again that line of questioning. He has just established by the original slips that in '45 no business was transacted in the name Noel Anderson & Sons. He cannot tie them, according to our discussion of yesterday, the '46 slips to anything that happened in '45 in regard to Noel Anderson & Sons.

Mr. Lewis: If the court please, it is an inquiry

(Testimony of Maurice Farrell.)

for all these years which we have been trying to cover and it has been gone into by the Government. We certainly will have a right to explain those entries. [171]

The Court: Well, we are dealing now with documentary evidence. All of these transactions were conducted with Noel Anderson in '45. Now, if we go into '46 we are dealing with the year '46. There is nothing in the '45 documents here to connect up with '46 because all the transactions were with Noel Anderson.

Mr. Lewis: I don't care to argue with the court, if the court please.

The Court: That is the way it appears to the court.

Mr. Lewis: I want to call the court's attention to this, that the witness testified under examination by the Government's attorney that he had other records here which were the original records of entry. He also testified as to the ledger entries for '46 and '47 and '48 and '49. Now he has the entries here, the original entries the Government has inquired into it, it is tied up now in '45, the next question will tie it up. The partnership has been tied up by reference to the sale of part of the crop in '45 and the transaction coming over into it. Now we are in the position where the Government into the '46 and '47 transactions and I submit we have a right to inquire. [172]

The Court: They inquired as to the first time the firm Noel Anderson & Son appears.

(Testimony of Maurice Farrell.)

Mr. Lewis: That is what I want to inquire.

The Court: The first transaction in his books of Noel Anderson & Sons and that was January 4th, I believe, '49.

Mr. Lewis: If the court please, I am sure that the records will show transactions in '46 in the name Noel Anderson & Sons by the original entries.

The Court: Well, he says——

Mr. Lewis: No, he didn't say; we haven't got to '46 yet.

The Court: Oh, you are talking about '46?

Mr. Lewis: Yes. We first inquired as to '45 and we are going on now following the cross-examination.

The Court: I will sustain the objection; you haven't tied it up.

Mr. Lewis: That is all. [173]

TED RITMAN

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lewis:

Q. Will you state your name?
A. Ted Ritman.
Q. Where do you live, Mr. Ritman?
A. Fort Benton, Montana.
Q. What is your occupation?
A. Ranching.

(Testimony of Ted Ritman.)

Q. Do you have any other official or other position in Chouteau County?

A. Chairman of the Board of County Commissioners.

Q. Of Chouteau County?

A. Of Chouteau County.

Q. Mr. Ritman, where is your farm land, where was your farm land from '35 on?

A. Approximately 7 miles east of the Loma Prairie.

Q. Was it in the vicinity of A. E. Anderson and Noel Anderson land? A. Yes, adjoining.

Q. Where were you living during those years from '35 to '43?

A. Well—'35 on, did you say?

Q. Yes. [174]

A. Well, I was on the home place of my dad's.

Q. The one that joins the Anderson lands?

A. That is right.

Q. And did you live there right along at that period?

A. Well, I believe it was in '38 I went up to Anaconda and worked one summer.

Q. Were you acquainted with the Anderson family in '38 and '39? A. Yes.

Q. How old were the Anderson boys about that time, if you recall?

A. Oh, I wouldn't attempt to say just how old they were. I would have to figure that out. I remember at the time they were both there but just exactly how old they were I wouldn't attempt to say.

(Testimony of Ted Ritman.),

Q. Do you recall whether or not you observed the farming operations of the Anderson's during that period?

A. Well, I have observed it, you might say, all my life.

Q. And clear on up through to the present time?

A. That is right.

Q. Do you know whether or not Noel Anderson, Jr., and Robert M. Anderson did any farm work during that period? A. I do. [175]

Q. When and what was the nature of it?

A. Ever since they were big enough to work they have been working in the field.

Q. Have they? Do you know whether or not they have taken care of the cattle?

A. I know that they have.

Q. And what is the nature of the work there?

A. Feeding and watering in the winter time, building fence in the summer time, riding.

Q. Did it or did it not include branding?

A. Including branding.

Q. Would you say or not that this work these boys were doing was vital work in connection with the work of the operations?

A. Well, it was definitely part of the operations; it was work that had to be done.

Q. Was any of this work having to do with farm machinery, tractors, combines and so forth?

A. Yes. There was very little horse work done since '35.

(Testimony of Ted Ritman.)

Q. And was that work extensive or just casual?

Mr. Angland: Well, just a minute. You make it difficult for the witness and we will object to it as calling for a conclusion of the witness.

The Court: Yes, I think so; make it a little more definite. [176]

Q. Mr. Ritman, is the nature of the work you refer to that the boys were doing in the field?

A. Summer fallowing and seeding, combining.

Q. Does that or does it not involve farm machinery and tractors? A. It definitely does.

Q. And power combines? A. Yes.

Q. Were you away in the '40's any?

A. Yes.

Q. Where? A. In the Army.

Q. When?

A. I was in the Army right at 3½ years. I believe I entered the Army in March 18th, 1942, I believe it was.

Q. And when were you discharged?

A. September 5th, '45.

Q. Did you know of A. E. Anderson's death?

A. Yes.

Q. Did you know anything about the formation of the family partnership between the members of Noel Anderson and his family in '45?

A. Yes.

Q. How soon did you know about that?

A. I believe it was in April of '45. [177]

Q. How did you get that word?

A. News from home.

(Testimony of Ted Ritman.)

Mr. Angland: Just a minute. I will object to that and move to strike the last answer; the witness' statement shows that it was clearly hearsay.

The Court: Yes, I think so.

Q. Mr. Ritman, did you have any business with the Anderson family shortly after you returned in '45 and carrying on the next two years?

A. Yes.

Q. And what was the nature of that business?

A. Well, I bought seed from them. I bought cattle from them. And I have sold them seed and I have sold them both horses and cattle.

Q. Who did you deal with?

A. I dealt with Noel Anderson & Sons; as far as the bill of sale that I gave for the horses and cattle that I gave to them was sold to Noel Anderson & Sons and the checks that I gave for the seed were written the same.

Q. To Noel Anderson & Son?

A. Noel Anderson & Son.

Q. During the period of '46, did you observe the work of Robert Anderson on the farm?

A. Well, just seeing him when he was out in the field. [178]

Q. Was he active in the operations in that year?

A. Up until he went to school.

Q. And he went to school when?

A. I don't remember just when it was but it was in the fall some time, as I recall.

The Court: Well, we will have to suspend here

(Testimony of Ted Ritman.)

and give the Reporter a rest. We will take a recess for fifteen minutes. (11:15 a.m.)

(Court resumed, pursuant to recess, at 11:30 o'clock a.m., at which time all counsel and parties were present.)

The Court: Proceed.

TED RITMAN

resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Lewis:

Q. In what year was that you were referring to, Mr. Ritman, '47?

A. I believe the question was asked for '46, wasn't it?

Q. '46, all right. Now, did you have opportunity to observe the operations of the farming operations of the Noel Anderson family during '47?

A. Yes. [179]

Q. And also Robert Anderson; was he there?

A. Part of the time.

Q. Was he there in the summer? A. Yes.

Q. Do you know the extent of his work?

A. Just the work that had to be done. I couldn't begin to name it all. The summer fallowing, duck footing, but summer fallowing is the main job during the summer.

Q. How about the harvest?

(Testimony of Ted Ritman.)

A. He took part in the harvest.

Q. How about the seeding?

A. Until he went to school. I don't remember whether he finished seeding before he went to school or not.

Q. What about '48? Do you know whether or not he entered the military service some time after '47?

A. I remember his going to the service but I don't recall just when it was.

Q. You recall he was there in '48, do you?

A. If he hadn't gone into the service, I am sure he was there, but when he went into the service I wouldn't say.

Q. Now, as to Noel J. Anderson, did you see Noel J. Anderson there in '46? A. Yes.

Q. How much of the time?

A. All the time. [180]

Q. He returned to the service when about?

A. He returned around the first of the year, as I remember.

Q. And was he there during all the time of '46?

A. I would say from the time spring work started.

Q. And do you know whether he performed services during that period and what they were?

A. Yes, he did the field work and mechanical work or anything that had to be done around the place.

Q. What do you mean by mechanical work?

(Testimony of Ted Ritman.)

A. Repairing tractor or anything or piece of machinery that should need repairs.

Q. What have you to say as to whether the operations of the Anderson family were conducted on a large scale or a smaller one?

A. I would say on a large scale.

Q. And what type of machinery, if you know, did they have?

A. They had rubber tired wheel tractors. If that is what you want.

Q. Yes. A. They had track tractors.

Q. And later they had both kinds of tractors?

A. Yes, as far as I can remember Mr. Anderson, dating back to the old three-wheel cats, they had a cat tractor and sometimes two of them. [181]

Q. Would you say it takes someone with skill to keep those pieces of machinery in operation?

A. Yes, it does.

Q. And do you know whether or not these two boys have that skill? A. Yes, they have.

Q. And have they used it, do you know?

A. Have they used what?

Q. Their skill in the operation? A. Yes.

Q. Mr. Ritman, did you have occasion to talk with Noel J. Anderson at any time during the year '46? A. Yes.

Q. Do you know what the subject of that conversation was?

A. The subject of that conversation was in regard to a partnership because I was going into a fifty-fifty proposition with my dad and I didn't

(Testimony of Ted Ritman.)

know all the ins and outs of it, so learned from him through our discussion something to base on the partnership deal.

Q. Do you know what the terms of the partnership of the Anderson family was? A. Yes.

Q. You have heard the testimony of Mr. Anderson here yesterday as to the details of the formation of a partnership? A. Yes. [182]

Q. Was that or was it not in general what you learned from Noel J. Anderson?

A. It was the same.

Q. And do you remember when the partnership began? A. Yes.

Q. When?

Mr. Angland: Just a minute. We will object to that. This is a conversation this witness is testifying about he had in '46 and doesn't tend to prove the existence of a partnership during the year '45. It is a self-serving declaration as well that he is apparently going to relate as having been made to him by Noel J. Anderson. Objected to as incompetent, irrelevant and immaterial.

The Court: Yes, I rather think it is.

Q. Mr. Ritman, directing your attention back to the business transactions you related that you had with Noel Anderson & Sons, when was your last transaction?

A. The last transaction was last fall. I bought some wheat from them.

Q. And how did you pay for it, if you paid for it? A. I paid them a check.

(Testimony of Ted Ritman.)

Q. And who was the check made to?

A. Noel Anderson & Sons. [183]

Q. Do you know whether or not during the period that you were acquainted with the old partnership, A. E. Anderson & Son, whether Agnes Anderson, the wife of Noel Anderson, did any work of any kind that might be connected with the operation of the farm and ranch?

A. A good share of it did; she did the cooking there at the ranch.

Q. For whom?

A. For everyone that was working there.

Q. And what have you to say whether there was any hired man outside of the family?

A. Yes, there was. I was one of them occasionally.

Q. And were there others? A. Yes.

Q. Over how long a time?

A. I would say they had a hired man all the time during the summertime.

Q. And you know that Agnes Anderson did the cooking for those hired men that were there at that time? A. A good lot of the time, yes.

Q. Of course, your being in the service in '45, you can't say as to the summer of '45, can you?

A. No.

Q. Do you have any remembrances about any other years?

A. Well, dating back as far as '34, '35 I worked there, during the summer I worked there in harvest three years straight hand running and I am certain

(Testimony of Ted Ritman.)

she [184] did the cooking and two harvests, and I think her sister-in-law helped her the third year that I was there.

Q. Now, do you know of any other work that she did? A. That she did?

Q. Yes. A. Outside of the cooking?

Q. Yes.

A. Yes, I know that she helped with the haying, and, well, helped around in harvest time in case of emergency.

Q. Do you know what she did in the haying operation?

A. Well, going after repairs, for instance, or, well, moving trucks around or pulling hay up on the stack.

Q. She actually worked in the field?

A. That is right.

Q. Now, when was that, as close as you can tell?

A. I couldn't say definitely. It was in the early '40's, sometime along in the '40's. I wouldn't say just what year it is; I couldn't tell you.

Q. Did you observe any after you returned from the Army? A. Her helping?

Q. Yes. A. Yes. [185]

Q. When was that?

A. She never did miss a branding. She always helped do cooking. When they were branding and moving cattle she brought up our lunches. Then any other thing where they needed a little extra help right on the spot.

(Testimony of Ted Ritman.)

Q. Like driving a car to town?

A. Moving an extra vehicle or something like that.

Q. And in this taking of lunches what would be that transaction?

A. Well she would have to catch up with us wherever we were at.

Q. On the road? A. That is right.

Q. When you were trailing cattle, you mean?

A. That is right.

Mr. Lewis: That is all.

TED RITMAN

Cross-Examination

By Mr. Bowen:

Q. Mr. Ritman, as a farmer in this area, wheat farmer, could you give me a narrative statement of something of the busy season in preparing the ground for winter wheat. I believe you refer to fallowing it [186] during the summer and early fall operations to lay it back, is that about right, or how would you describe the farming operations?

A. Well, a lot depends on the weather conditions of the summer. If there is plenty of moisture, lots of rain, why you are busy right from the time you start until after the first of September, and so as far as keeping the weeds down on your summer fallowing occasionally like this year it so happens there wasn't very much moisture and the weeds didn't grow so it was more or less a slack time.

(Testimony of Ted Ritman.)

Q. Do you mean by that you are sort of laying it back by early fall?

A. I don't know what you mean by laying it back, but the operations more or less start sometime after the first of April and there is very little field work done after the 1st or 15th of October. Some farmers will go out and rip up stubble lands; it may be the 15th of October maybe but it is not a common practice after the 15th of October.

Q. You stated you entered the Army March 1st, 1942, and were discharged September 5, 1945, where were you discharged, Mr. Ritman?

A. I got my discharge papers in Salt Lake [187] City.

Q. Did you come directly home? A. Yes.

Q. You were home then in early September, '45?

A. Yes, sir.

Q. At that time your crop or rather your family crop as far as farming operations was probably complete?

A. For the summer for the year of '45.

Q. Yes. A. No.

Q. Did you immediately then chip in with what was yet to be done in '45?

A. I wouldn't say I devoted all my time out there to my dad's place; I was out there but I didn't devote all my time out there.

Q. What were you doing the rest of the time?

A. Well why we lived in town and my wife was living in town and that is where I stayed when I

(Testimony of Ted Ritman.)

wasn't out at the ranch. I would say I was out there about half of the time.

Q. Were you engaged in another occupation here in town or other business?

A. No. I just got back from the Army.

Q. You were sort of taking it easy after you got home?

A. If you want to put it that way, yes. [188]

Q. I believe you stated on direct, Mr. Ritman, something about business transactions after your returning from the service with Noel Anderson & Sons, is that correct?

A. That I have had business dealings with them.

Q. After you returned from the Army in September, '45?

A. I didn't say that I had dealings with them in September, '45, I don't believe.

Q. When was your first dealing?

A. I couldn't tell you offhand to save me.

Q. Do you recall any specific dealings in '45 at any time?

A. No, I can't recall any particular thing, no.

Q. You noted, Mr. Ritman, that from '35 to '37, three seasons that you worked as a straight hand on the Anderson farm, is that right?

A. No, I wouldn't say a straight hand. What do you mean by straight hand?

Q. I thought that was an expression you used. You say you worked there then?

A. Part time.

(Testimony of Ted Ritman.)

Q. And in two of the years Mrs. Anderson cooked for the men?

A. I believe that is right. I have worked there several years as far as that is concerned and I know that in the years that I have worked for Andersons she [189] has cooked more than two years that I have worked there but what years they were I wouldn't attempt to say, to give any dates, but I know it is more than two years; that don't get the impression that I mean she only cooked two years because that is not so.

Q. All I want to do is get from you your best recollection. I am not trying to put words in your mouth. Then obviously because you went into the service in March of '42, your knowledge of any cooking activities by her would have to relate back to prior to that time, isn't that correct?

A. Over any great period of time, yes.

Mr. Bowen: No further questions, your Honor.

TED RITMAN

Redirect Examination

By Mr. Lewis:

Q. Mr. Ritman, you testified, I believe, that the farming operations quite often go into as late as October 15th of the year. Now what have you to say about when normally, if you know, the Andersons finished their seeding?

A. I would say one year with another probably

(Testimony of Ted Ritman.)

they will be through probably the 20th of [190] September.

Q. And do you know whether or not that is before the school term starts in the colleges in Montana?

A. I would say that is before the college term starts, quarter starts.

Mr. Lewis: That is all.

TED RITMAN

Recross-Examination

By Mr. Bowen:

Q. Mr. Ritman, you say you would say that was before; you have no specific knowledge of when the school term starts?

A. I never went to college.

Mr. Bowen: No further questions.

AGNES ANDERSON

Direct Examination

By Mr. Lewis:

Q. Will you state your name, please?

A. Agnes Anderson.

Q. What relation are you to the plaintiff in this action? A. His wife. [191]

Q. And when were you married?

A. July 1st, '25.

Q. And where do you reside?

A. At present?

Q. Yes. A. In Fort Benton.

(Testimony of Agnes Anderson.)

Q. How long have you lived there?

A. Since '38 except for the summer months.

Q. And where do you live in the summer months? A. At the ranch.

Q. And is that the ranch that is involved in this matter? A. It is.

Q. In Chouteau County?

A. In Chouteau County.

Q. And Mrs. Anderson, where did you live before you and the plaintiff were married?

A. Well I lived in that community since '17.

Q. Since '17? A. That is right.

Q. And I suppose the first you know about the farming operations of your husband would be when you were married in '25?

A. That is right. [192]

Q. Now do you know what the extent of those farming operations were at that time, just in a general way? A. Well, yes.

Q. Well, what was it?

A. Just about the same as we do now, not as extensively.

Q. Dry land farming?

A. Dry land farming.

Q. And cattle? A. Yes, a few.

Q. Not as extensively as now? A. No.

Q. Now was there anyone else there on the farm at the time?

A. Noel's mother, father and his sister.

Q. And about how long—did you know about

(Testimony of Agnes Anderson.)

the partnership relations between your husband and his father? A. Yes.

Q. And about how long did that exist?

A. Well, I couldn't tell you the exact years of it.

Q. For a number of years prior to Mr. A. E. Anderson's death? A. Yes. [193]

Q. As many as 8 years? A. Probably.

Q. Were you acquainted with any of the business of the partnership of A. E. Anderson & Son?

A. How do you mean?

Q. Well did you do any work on the accounts or anything of that kind?

A. Well, I used to help Mr. Anderson, Sr., with the accounts and kept the time book for the hired man and things like that.

Q. What is the extent of the hired man, was it in those days of the earlier partnership and later?

A. Well we used to have from 1 to 12 or 13 men in the earlier days during harvest time; we had an awful crew around.

Q. And who did the cooking for those crews?

A. I have cooked every year since I have been married until, well, since '45; and I have been out every year during harvest and during branding.

Q. Since then, too? A. Since then, too.

Q. During the years of the first partnership, A. E. Anderson & Son, did you do any other farm work or outside work in connection with the farming operations?

A. If the occasion demanded it, yes. [194]

(Testimony of Agnes Anderson.)

Q. And would you state what the nature of that work was?

A. Well I helped them during haying on occasion and always during branding, and I have helped with the milking and chores around the place.

Q. What was the nature of your work in the haying operations?

A. I run the pickup to stack the hay, to pull the stacker.

Q. To pull the stacker? A. Yes.

Q. And did you work at that a full day?

A. Yes, sir, right with the men.

Q. Day after day? A. Yes.

Q. And would you be able to say what times as close as you could as to when that was?

A. What year that was?

Q. Yes.

A. Well, it was before Mr. Anderson's death.

Q. Probably how many years?

A. '42 on; I couldn't tell you definitely.

Q. Probably two years? A. Probably.

Q. Now what other work outside have you done in connection with the partnership, the old partnership? [195]

A. I have hauled wheat during harvest. I have driven the truck to spread grasshopper poison, and helped them bale out straw and any odd job where they needed someone to drive a truck and men were not available.

Q. During this period were there times when labor was scarce? A. Very.

(Testimony of Agnes Anderson.)

Q. And was there any time, state if you know, if there was any time when you were working shorthanded? A. Well, yes.

Q. And during such times what was the nature of your work compared to any other time?

A. Any time they were shorthanded I did the work in the house and always ready to go when they said to go here or here, and I had to stop whatever I was doing in the house and run those errands and help them.

Q. And did you do that? A. I did.

Q. Well, Mrs. Anderson, did you during those years, did you have a checking account with your husband?

A. We have had a joint account, yes.

Q. Do you remember when it was started?

A. Well, I believe about '42. [196]

Q. About the year '42?

A. I believe. I wouldn't swear to it.

Q. And can you state whether or not that account has been continuous? A. Yes, it has.

Q. Now, do you know where the money came from that was deposited in that account through those years '42 up to the year '45?

A. Well, from the partnership earnings.

Q. From A. E. Anderson & Sons? A. Yes.

Q. Your husband shared in that partnership?

A. That is right.

Q. And during that period have you owned an undivided half interest in that account at all times?

A. That is right.

(Testimony of Agnes Anderson.)

Q. And do you have authority to write checks on that account? A. Yes, sir.

Q. During what period? A. All the time.

Q. From the time it was opened? A. Yes.

Q. And up to the present time? A. Yes.

Q. Has that actually been continuous from the time it was opened to the present time?

A. Yes. [197]

Q. A joint account of you and your husband?

A. Yes.

Q. Mrs. Anderson, do you know of the business situation so far as at the time of your father-in-law's death something about the business affairs of the partnership?

A. That it was a fifty-fifty partnership, yes.

Q. Between?

A. Between my husband and his father.

Q. Between your husband and his father?

A. Yes.

Q. Now, when did he die?

A. Christmas Eve, '43.

Q. '43? A. '43.

Q. Now, do you know what occurred in the handling of the business affairs of the farming operations during the year '44?

A. Well, the farming operations had to be carried on.

Q. And were they carried on as the old partnership? A. I believe so.

Q. In '44? A. Yes. [198]

Q. And after Mr. Anderson's death do you recall

(Testimony of Agnes Anderson.)

any time that you and your husband discussed business affairs as to what your future was to be?

A. Yes.

Q. When was it?

A. Well, it was during the time that the estate was being settled. I couldn't say just exactly when.

Q. Was anything said in any of those discussions about forming of the new partnership that would include members of your family?

A. It was.

Q. Well, now could you say when that occurred or what year it occurred in? A. In '44.

Q. During '44? A. '44.

Q. And who did you discuss that matter with?

A. My husband and I discussed it.

Q. I didn't get that?

A. My husband and I discussed it.

Q. And did you come to any conclusion at all as to what you intended to do?

A. Yes, that we would have a partnership with the boys, with the two older boys.

Q. And that was before you had talked to them about it? [199]

A. Well, we discussed it. Well, no, we didn't discuss it together because they weren't there.

Q. Your first discussion was with your husband?

A. Yes.

Q. Do you know how early in '44 that may have been? A. No.

Q. Was there any particular time in '44 when

(Testimony of Agnes Anderson.)

you discussed the matter with one of the boys and your husband? That would be the year following?

A. And Bob was in school?

Q. Yes.

A. Christmas, he was home during Christmas vacation.

Q. In '44? A. In '44.

Q. Do you recall the incident of that conversation and conference?

A. We told him that we would—now, let's see. That a partnership would be formed with my husband any myself each to share one-third and the two boys to share one-third or one-sixth each.

Q. And you mean by the two boys, Robert and Noel, Jr.? A. Yes.

Q. Noel J. wasn't it? A. Yes. [200]

Q. He was in the service? A. Yes.

Q. In the military service? A. Yes.

Q. Now, Mrs. Anderson, about when did that conversation and conference occur?

A. About when?

Q. Yes.

A. Well, the latter part of December, I imagine. I don't remember just exactly when Christmas vacation started.

Q. But it was during Christmas vacation when Robert was home from college, is that it?

A. Yes.

Q. Now did the conference reach a stage where there was any agreement as to what should be done?

A. Yes, I think so.

(Testimony of Agnes Anderson.)

Q. That is right? A. Yes.

Q. Was there any time set when that partnership was to begin? A. The first of January.

Q. Of what year? A. Of '45.

Q. Well, did it begin then? What happened after that? [201]

A. Well, yes, it started then. Our accounts were charged Noel Anderson & Sons; I mean our partnership started then.

Q. Your partnership started in '45?

A. Yes.

Q. And do you know, Mrs. Anderson, what work Robert did, if any, during the year '45?

A. During '45?

Q. Yes.

A. Well, he worked, he came home to help with branding in the spring.

Q. Before school was out?

A. Yes, that would be in May.

Q. Did you help with branding at the same time?

A. Yes. And then when school was out he was home to do summer fallowing and any field work that was to be done.

Q. And did he do it? A. He did.

Q. For over what period?

A. Until he went back to school in the fall.

Q. Of '45? A. Of '45. [202]

Q. State whether or not your son Noel J. Anderson was home at any time during '45?

A. He was home in January of '45, wasn't he?

Q. Were you present at any conversation held

(Testimony of Agnes Anderson.)

between Noel J. Anderson and your husband when Noel was home on furlough? A. Yes.

Q. Did you hear what occurred?

A. We, or Mr. Anderson told Noel Junior about the partnership that we were forming or had formed and that he was to have one-sixth interest.

Q. That he was to have one-sixth partnership in it? A. Yes.

Q. You heard that conversation?

A. I heard that conversation.

Q. Did you hear what Noel Junior's answer was?

A. He said: "That is okay."

Q. About when was that?

A. Well, it was when he was on home delay en route; it was not really a furlough; it was delay en route on his way overseas. The exact date I couldn't tell you.

Q. Early in January? A. I think so.

Q. Mrs. Anderson, did you do any field work or outside work in connection with the farming operations during '45? [203]

A. Yes, I hauled wheat.

Q. And what were they?

A. I hauled wheat.

Q. With a truck?

A. I hauled to town when we wanted wheat to go to the elevator in town. I hauled wheat.

Q. That would be to Loma? A. Loma.

Q. How far is that?

A. 9 miles across the ferry.

Q. Across the ferry.

(Testimony of Agnes Anderson.)

A. Across the ferry.

Q. On what river? A. Missouri River.

Q. And was that work just an occasional load or was it regular in the harvest?

A. Regularly while we hauled wheat to the elevator; when the elevators were filled we binned it at the ranch. Hauling it on the ranch for storage was a different proposition than hauling it to town.

Q. That on occasions would go on the full harvest season or not? A. Yes.

Q. Have you taken part in conferences with reference to the partnership with other members of the family at any time since its formation?

A. Yes. [204]

Q. And what was said or done in that conference?

Mr. Angland: Just a minute. I think we should have some definite place or time of these conferences.

Q. Can you recall the place where, anyone that you have in mind now? A. Well, in the house.

Q. At your home? A. At our home, yes.

Q. And who would be present if you recall definitely?

A. Well, I believe on occasions, I couldn't say just definitely.

Q. Do you recall the year?

A. Do I recall the year?

Q. Yes.

A. Well, '45 was when we were.

(Testimony of Agnes Anderson.)

Q. When you talked over partnership matters?

A. When we formed the partnership, '44 and '45. '44 we were talking about it and '45 we did it.

Q. Were you familiar with the books of the partnership? A. Yes.

Q. The new partnership? A. Yes, I am.

Q. Have you worked on them and know what some of the items are? [205]

A. I have made entries on them on occasion; most of the time Noel does it.

The Court: I think you better suspend here. We will take a recess until two o'clock this afternoon.

(12:15 o'clock p.m. 12/12/52.)

(Court resumed, pursuant to recess, at 2:00 o'clock p.m., at which time all counsel and parties were present.)

AGNES ANDERSON

resumed the stand and testified as follows:

Direct Examination
(Continued)

By Mr. Lewis:

Q. Mrs. Anderson, do you have authority to write checks on the Noel Anderson & Sons account?

A. I have.

Mr. Lewis: If the Court please, at this time to shorten matters up there is a stipulation which we have agreed to in this case with reference to the time of opening the various accounts and as to who

(Testimony of Agnes Anderson.)

had the right to sign and we would like to have them introduced and made a part of the record.

The Court: Very well.

Mr. Lewis: I am not sure of the practice. Is it the practice to have stipulations of that sort marked as an exhibit? [206]

The Court: Yes, certainly.

Mr. Lewis: Then I think it should be marked as an exhibit and will the record show the number that the clerk would give it. (38).

Q. Mrs. Anderson, have you written any checks on the partnership funds for business expenses during the time since the formation of the partnership? A. I have.

Q. I hand you Plaintiff's Exhibit No. 39 and ask you if you recognize the signature?

A. That is my signature.

Q. Is that your signature? A. Yes.

Q. And when was it given?

A. This date is August 2nd, '46.

Q. And do you know for what it was given?

A. It is written to Ragland Grocery and it is for our account at the ranch.

Q. The ranch account?

A. The ranch account.

Q. And it has nothing to do with your personal account? A. No, it hasn't.

Mr. Angland: We will have to renew the objection we have heretofore made; that again is a mater of '46. The stipulation now made a part of the [207] record shows that there was no account

(Testimony of Agnes Anderson.)
opened for Noel Anderson & Sons until April 30th, '46, and that is in August, '46.

The Court: Is it the same check we had before?

Mr. Angland: It is the same concern and we haven't any transactions with that concern yet in evidence showing that Noel Anderson & Sons did business with that concern in '46 or '45.

The Court: I will sustain the objection.

Q. Mrs. Anderson, are you familiar with the books of the partnership of Noel Anderson & Sons?

A. In a general way, yes.

Q. And the way the accounts are kept?

A. Yes.

Q. I hand you Plaintiff's Exhibit 9 and ask you to refer particularly to page 2, Plaintiff's Exhibit 9-a, and pages 27 to 34, inclusive, Plaintiff's Exhibits 9-b, c, d, and e, and I will ask you if you know whether or not those entries on those pages are entries of receipts and expenditures of the account Noel Anderson & Sons for the year '45?

Mr. Angland: To which we object, your Honor.

Mr. Lewis: I am just asking whether she knows.

Mr. Angland: Well, we will object to it; the record speaks for itself; the record is in [208] evidence.

The Court: These books are all in evidence, aren't they?

Mr. Angland: Yes, that is my understanding. They have been introduced, haven't they, Mr. Lewis?

Mr. Lewis: I was going to look into the ques-

(Testimony of Agnes Anderson.)

tion whether this part has been introduced and I want to know whether this has been introduced.

The Clerk: Exhibits 9, a, b, c, d, and e have all been admitted.

Mr. Lewis: They were admitted, if the Court please.

Q. (By Mr. Lewis): Now, Mrs. Anderson, I hand you Plaintiff's Exhibit No. 12 and ask you to turn to pages 62, 60 and 62. Are you familiar with Plaintiff's Exhibit No. 12? A. Yes.

Q. Do you know whether or not page 60 of that exhibit contains all of the charges against Noel J. Anderson, all of his credits for earnings in the partnership down to the beginning of '51?

A. I believe it does.

Q. Now if you will turn to page 62. Do you know whether or not page 62 contains all of the charges which included withdrawals by Robert M. Anderson from the partnership of Noel Anderson & Sons, and whether it contains the credits for the earnings of that partnership from the time it began in January 1st, '45, to the beginning of '51? [209]

A. I believe it does.

Q. Now, will you turn to page 58 of Plaintiff's Exhibit 12. Are you familiar with the entries made on that page, Mrs. Anderson?

A. In a general way, yes.

Q. Now are those the—what do those entries represent?

A. The partnership earnings and the charges against the account.

(Testimony of Agnes Anderson.)

Q. Against whose account?

A. Against Noel and Agnes.

Q. Then it includes your earnings which have been credited for your share of the earnings in the partnership and it includes all of your withdrawals which are charged to you, the withdrawals of you and your husband, Noel Anderson, from the beginning of the partnership in '45 to the beginning of the year '51? A. That is right.

Q. Mrs. Anderson, I call your attention to one or two items, for instance, August 15th, bonds, and there is another item for June 10th, bonds, and one or two others for bonds; do you know what those items are?

A. Government bonds that were purchased.

Q. Out of the earnings, your share of the earnings, yours and your husband's from the partnership? A. From the partnership. [210]

Q. Now, do you know, those bonds, whose name they are in? A. Mr. husband's and my name.

Mr. Lewis: You may take the witness.

AGNES ANDERSON

Cross-Examination

By Mr. Bowen:

Q. It was established on direct, Mrs. Anderson, that beginning in '38 you left the ranch and moved into town, is that correct?

A. For the school years, yes; school months, I mean.

(Testimony of Agnes Anderson.)

Q. You have heard the testimony of your husband, Mr. Anderson, yesterday and today; do you recall his testimony that when you left the ranch in '38 a hired man and his wife was then hired? Do you recall that? Is that true?

A. We had a man and his wife on the ranch, yes.

Q. Did they live at the ranch house?

A. Yes.

Q. They sort of maintained the ranch house?

A. In one of the houses, yes. [211]

Q. Mrs. Anderson, Mr. Anderson testified that the wife of the ranch hand beginning in '38 helped with the cooking, is that your recollection?

A. Yes.

Q. Helped with the cooking there at the ranch for the hired hands? A. Yes.

Q. I presume she continued that during the harvest season at which time you had the bulk of your hired hands?

A. I was there during the harvest season.

Q. She aided you in cooking? A. In '38?

Q. In '45?

A. In '45? In '45 there was a different couple at the ranch in '45 than there was in '38.

Q. There was? A. Yes, sir.

Q. Then this second man and his wife, she assumed the responsibility of at least in part in cooking for the hired help at the ranch?

A. She did part of the cooking.

Q. What was left for you to do in the way of cooking?

A. I did the general supervising. I told them

(Testimony of Agnes Anderson.)

what to cook and what to save. You can't let hired help come in and take full charge of running a household; you have to have a little restraint on them. [212]

Q. You mentioned, Mrs. Anderson, hauling wheat during the harvest season in '45?

A. Yes.

Q. How long was that season, do you recall?

A. I don't remember. It depends on how much rain we had during harvest. I couldn't tell you the exact number of days.

Q. Be three days?

A. Not three days in harvesting operations. Well, say about 10 days.

Q. Now I am referring to your hauling operation as part of the harvest operations?

A. I don't remember.

Q. You couldn't give us a rough figure to the best of your knowledge, three days, one week?

A. I don't remember.

Q. Mrs. Anderson, with your knowledge of ranch work and your acquaintance with ranch families in this area do you feel that you did more in the year '45 than any other well wife, able-bodied wife might do in the way of helping on ranch operations?

Mr. Lewis: That is objected to as calling for a conclusion of the witness.

The Court: Well, I think so; sustain the objection. [213]

Q. You refer, Mrs. Anderson, to the joint bank

(Testimony of Agnes Anderson.)

account of you and your husband and that you drew checks on that account, is that correct?

A. That is right.

Q. Did you draw checks on the account in '45 to your knowledge? A. In '45?

Q. Yes, ma'am. A. I must have.

Q. What do you usually, what purpose would you have when you drew checks on the joint account; what would you use the money for?

A. I can draw a check on the joint account for anything I wish.

Q. Yes, ma'am, I realize that, but what was your purpose for which you did draw checks?

A. Any necessary expenses or anything else.

Q. Would you say that Mr. Anderson drew the majority of the checks or that you drew just a few, would that be a fair statement?

A. I don't think so.

Q. What proportion of the checks drawn on that account would you say you drew?

A. It varies; I wouldn't know. [214]

Q. Do you recall a meeting between Mr. Henoland, Internal Revenue Agent and Bureau of Internal Revenue and you and Mr. Anderson had at your ranch or probably your Fort Benton home in the fall of '51? A. I remember it.

Q. You remember meeting Mr. Henoland at that time? A. Yes.

Q. You served him coffee at the time?

A. Yes.

Q. Do you recall a statement at that time that

(Testimony of Agnes Anderson.)

Mr. Anderson drew the great bulk of the checks on your joint account and that only in emergency did you draw checks?

A. From our joint account?

Q. Yes, ma'am, that is right, being the only account that you could draw on in '45?

A. I don't remember such a statement.

Q. Would that be a fair statement of the proportion of checks you did draw?

A. On our personal bank account?

Q. Yes, ma'am. The stipulation shows that in '45 the only bank account you could draw against was the joint account of you, that you and your husband had with the Choteau County Bank? [215]

A. I don't know that I have ever been restrained to emergency to sign a check on our joint account.

Q. I am not suggesting that you were restricted in the drawing of checks on your account but I am referring now to the practice. Of course, you could draw a check on your account any time you wished because the bank had your name, your signature card, but as a matter of practice wasn't it true it was seldom that you drew a check on the joint bank account, recognizing, of course, that you had the right to do it at any time you wished?

A. I think that I could draw checks on our joint account any time.

Q. Did you?

A. It didn't matter whether Mr. Anderson wrote the check or whether I wrote the check.

Q. You referred to purchase of bonds in '45,

(Testimony of Agnes Anderson.)

Mrs. Anderson. Would you explain a little more in detail about the purchase of these bonds? You did purchase bonds in '45, didn't you?

A. I don't remember the date.

Q. Did you purchase any bonds in '45?

Mr. Lewis: The record doesn't show that.

Q. Did you purchase any bonds out of this joint account in '45?

A. I can't say definitely, but I believe—I couldn't say definitely. [216]

Mr. Lewis: If the Court please, I believe she has a right to refer to the record. He directed her attention to particular items in the record.

The Court: All right, let her read the record.

A. In '45 the record does not show.

Q. Anything about the purchase? A. No.

Q. I don't recall that it was established on direct, Mrs. Anderson, what checks were drawn for when you drew checks on the joint account. Do you recall what you did draw a check for, recognizing, of course, that you had the full right to draw checks, on the joint account?

A. On our personal account?

Q. That being the only one you could draw against in '45?

A. As I said before, any expenses or——

Q. Expenses, would that be family expenses?

A. Family expenses for our personal account is our own personal operations.

Mr. Bowen: No further questions, your Honor.

AGNES ANDERSON

Redirect Examination

By Mr. Lewis:

Q. Mrs. Anderson, directing your attention back to the manual work on the farm, particularly in '45 with reference to the cooking when you had help there, did you or did you not also do part of the cooking? A. I did.

Mr. Lewis: That is all.

The Court: Call your next witness.

NOEL J. ANDERSON

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lewis:

Q. Will you state your name, please?

A. Noel J. Anderson.

Q. What relation, if any, are you to the plaintiff in this case? A. I am a son.

Q. And where do you live, Mr. Anderson?

A. I live on a ranch east of Fort Benton.

Q. Is that ranch the ranch that is involved in this partnership involved here? A. Yes. [218]

Q. How long have you lived there?

A. All my life.

Q. Were you there then during the time of the partnership of your grandfather and your father?

A. I was.

(Testimony of Noel J. Anderson.)

Q. And at that time did you do any work during any of that period on the farm?

A. I have done work on the farm all the time that I was able to whenever I was big enough.

Q. And when did you start out, how old were you when you started?

A. I did a little all of the time from the time I started there; in '38 I started on the heavier work.

Q. '38, from that time on will you state what the nature of your work was on the farm?

A. Well, we drove tractor, mowing hay, and helped in other ways, putting up hay, during harvest drove the truck, hauled the wheat, helped in moving cattle, helped with branding, and helped a little with fencing.

Q. Was any of that work in those years work that required skill, either in farming operation or cattle raising operation?

A. Well, not technical skill, no. [219]

Q. How long were you working at that?

A. You mean how long?

Q. Did you work at that type of work you are mentioning now, every year up until the time of your grandfather's death?

A. Yes, up to the present day.

Q. And did you work on the farm during the year '44? A. I did.

Q. Now in the years along at that time what was the nature of your work so far as the type of machinery that you handled?

A. You mean up until '44?

(Testimony of Noel J. Anderson.)

Q. Yes.

A. Well, starting with '42, I believe we were driving tractor in the field with the summer fallowing along with what we had been doing before.

Q. Did you do any work at harvesting?

A. We always helped at harvest.

Q. What did you do?

A. Well, even before '38 we were helping on the combine, dumping straw and things like that, and '38 on we were driving trucks usually or helping at the granary, and from '42 or '43, I don't remember which, I drove tractor on the combine. [220]

Q. And combine?

A. On the combine, pulling combine.

Q. In the course of your work did you ever have any breakdowns with the machinery?

A. Yes, a few.

Q. What happened then when you had a breakdown? A. Fixed it and went on.

Q. You fixed it? A. Yes.

Q. How much experience have you had in that line of mechanic work?

A. Well, ever since '41 I have either helped or done all of the overhauling of the machinery on the farm.

Q. You mean yearly overhauling; that would include complete overhauling of a tractor, for instance? A. Yes, sir.

Q. Could you do that yourself?

A. I have helped with it since '41, and since '46

(Testimony of Noel J. Anderson.)

probably, I was in the Army in '45, but since '46 I have done most of it myself.

Q. And during that period do you know whether or not it was necessary for the partnership to hire any experts to keep the machinery in repair? [221]

A. There has been some work hired that was a little too heavy for the equipment that we had at the ranch to handle, so that it was brought up here to Great Falls or to Fort Benton to be overhauled.

Q. Outside of that state whether or not you have taken care of the repairing? A. I have.

Q. In all the years except when you were in the Army? A. Yes, sir.

Q. Now, Mr. Anderson, when did you enter the military service? A. September 19th, '44.

Q. Prior to that time did you do any work in the summer of '44 in preparation for the '45 crop?

A. The majority of my time the summer of '44 was spent in summer fallowing and preparing for the '45 crop and harvesting '44 crop.

Q. Did you have anything to do with the seeding of the crop in '44 for '45? A. I did.

Q. How much of it did you do?

A. I would say that I did half of it.

Q. About half of it? A. Yes. [222]

Q. And in acreage what would that be?

A. It was around 1100 acres in '44, I believe.

Q. Total? A. Yes.

Q. Who helped? A. My brother.

Q. Robert M. Anderson? A. Yes.

(Testimony of Noel J. Anderson.)

Q. What have you to say about the amount of work that he did that summer?

A. He and I worked together on the summer fallowing and everything.

Q. Explain to the Court what would happen, what you would be doing while your brother was doing something else?

A. Well, there's fencing and other work to be done, and if one was fencing why another would be summer fallowing.

Q. How much of your time and your brother's time was spent during the working season of '44 in either the preparation of the ground and seeding the crop for '45 or anything for the '44 crop, how much of yours and your brother's time?

A. Well, part of the time was spent with the cattle and on fencing, our entire time was spent at the ranch working looking after—— [223]

Q. Either in the farming operations or the cattle? A. That is right.

Q. Where did you go when you entered the service, Mr. Anderson?

A. I went to Fort Douglas, Utah, where I was sworn in and then to Camp Hood, Texas.

Q. Were you home any time after you entered the service?

A. I was home on delay enroute to Fort Ord, California, some time after the 15th of January.

Q. Of 19—— A. '45.

Q. '45 or '46? A. '45.

Q. '45? A. Yes.

(Testimony of Noel J. Anderson.)

Q. And how long about were you home at that time?

A. Well, I wasn't home very long. I don't think I was actually in Fort Benton over three days.

Q. Did you and your father talk over any business matters during that period?

A. Yes, we did, we talked over forming a partnership and I agreed to it. [224]

Q. For what purpose?

A. Well, we had helped on the ranch all the time and he figured that if he gave us a share in the ranch, we would be more willing to do our best to make the ranch a paying proposition and he offered us this partnership agreement so it would be a little better than wages.

Q. Did he or did he not outline to you in general what he had in mind in forming the partnership?

A. He did.

Q. And what did he tell you as to the shares?

A. He and my mother were to each have one-third and my brother and I were to split the other third and we would have a sixth apiece.

Q. Was there anything said as to whether you were to buy and have an interest in and pay for any part?

A. Yes, he said we would be charged for the appraised value, I guess you would call it, of the property that would be in the new partnership.

Q. And you would be charged with one-sixth of that? A. Yes.

Q. And how were you to pay it?

(Testimony of Noel J. Anderson.)

A. Out of the earnings of the partnership.

Q. And did he tell you whether or not there had been a previous meeting of himself and your mother and Robert? A. Yes, he did. [225]

Q. What did he say about that?

A. He said he talked it over with Bob when he was home on Christmas vacation and it met with his approval.

Q. And what was said about whether he was going ahead; what did you say you want to do about it? A. I wanted to go ahead with it.

Q. And was anything said as to when it was to start?

A. It was to start January 1st, '45.

Q. And was anything said about what your responsibility was to be after you got out of the service?

A. Well, I was in the Army then and I didn't know when I was going to get out, so after I got back I was supposed to help with the work the same as I had been.

Q. And what happened then after you left home when you were visiting at that time?

A. I went overseas.

Q. Where did you go? A. Okinawa.

Q. Were you in active service? A. I was.

Q. What was the result of that?

A. I was wounded on May 1st, '45. [226]

Q. And what was the nature of the result in general, not in detail?

(Testimony of Noel J. Anderson.)

A. I was hit by a small shell and returned to the States.

Q. You were returned to the States?

A. Yes.

Q. Where were you taken then?

A. Oh, I was in Brigham City, Utah, for a while in the hospital.

Q. In a hospital? A. Yes.

Q. And how long were you in the hospital, do you know, when you returned to the States?

A. No, I couldn't say the exact time. I think it was around the first of October, '45.

Q. And do you know where you were then from that time on until you were discharged?

A. After I returned to the States you mean?

Q. Yes. A. Yes.

Q. Where?

A. I was in Letterman Hospital in California for a week or two until they decided where to send me, and then they sent me to Bushnell General Hospital where I was given my Army discharge, and then they sent me to the Veterans Hospital, Sheridan, Wyoming, and I was only there a few days and they sent me home. [227]

Q. And about when did you arrive home?

A. Oh, it was around the middle of January or shortly after that.

Q. Of '46? A. Yes.

Q. And where have you been since that time?

A. Well, I was on the ranch all the time up until that fall I went to school down at Bozeman for the

(Testimony of Noel J. Anderson.)

year '46 and '47, and I have been on the ranch ever since I went to school.

Q. You were in school for part of the school year '46 and '47 at Bozeman?

A. Yes, I believe I took two quarters.

Q. At Montana State College? A. Yes.

Q. And the rest of the time you have been on the ranch? A. Yes.

Q. Now do you live on the ranch or in town?

A. Well, last winter I lived on the ranch and batched all winter.

Q. And have you been there a great deal of the time during the winters as well as the summers since then?

A. I have when I was needed out there.

Q. Who have you been working for or with since you were discharged from the Army? [228]

A. I have been working as a partner in the partnership of Noel Anderson & Sons.

Q. During all that time?

A. During all of that time.

Q. State whether or not since you returned from the Army the terms that were laid down in the agreement that you testified to were carried out?

A. They have been.

Q. And have you ever examined the books or do you know anything about the books of the company?

A. I have a general idea of them, yes.

Q. I hand you Plaintiff's Exhibit 12, Mr. Anderson, are you familiar with that book?

(Testimony of Noel J. Anderson.)

A. Yes, this is the book that our individual accounts are kept in, our partnership standing.

Q. How each member of the partnership stands?

A. Yes.

Q. In whose handwriting is that, if you know?

A. It is in my father's.

Q. Just glance through the pages and see if it is all in there? A. Yes.

Q. Are you particularly familiar with page 60 or not?

A. Yes, that is the record of my individual drawings on the partnership. [229]

Q. The first item, what does that men? The first item there, if you know?

A. That is the $7,500.00 that I was charged for my one-sixth share in the partnership.

Q. And where it says income tax, federal and state, do you know what that is?

A. That is the amount that I was charged for on, for the income taxes paid on '45 income.

Q. And on through since then? A. Yes.

Q. Down to the year '51, inclusive, for income tax? A. Yes.

Q. Now that is what you paid as income taxes?

Mr. Angland: Just a minute now.

Mr. Lewis: I will withdraw that.

Mr. Angland: I think it is contrary to some evidence that is already in, Mr. Lewis.

Mr. Lewis: Well, I don't know that it is.

Q. Does this represent, does it or does it not

(Testimony of Noel J. Anderson.)

represent the charges that were made on the books for your individual income tax returns?

A. It does.

Q. Now the other items. For instance, I call your attention particularly to the item "cash drawn" under March '46, $348.00, do you know what that is? [230]

A. Well, that is money I drew from the partnership; I got for my own personal expenses.

Q. That was chargeable to you? A. Yes.

Q. And on down I direct your attention to net income June, "by cash '48," $4,930.00, do you know what that is?

A. It is money that I drew from the partnership account.

Q. Now in other years down to January 1st, '51, does this column represent all of the withdrawals for your share in the partnership that you have made, including the payments of your income tax and any charges for any other purposes that were properly charged to you? A. Yes, it does.

Q. Directing your attention to the column on the righthand side, what does that column contain?

A. That is the record of my earnings in the partnership.

Q. And that includes your earnings down to '50, inclusive? A. That is right.

Q. Then the book at the present time does not have either the charges against you in the partnership accounts nor your credits for '52?

A. No. [231]

(Testimony of Noel J. Anderson.)

Q. Do you know whether or not during the years from beginning from January 1st, '45, to you know now whether or not the operations on the farm, including livestock operations, were conducted by the firm of Noel Anderson & Sons?

Mr. Angland: Just a minute. That is calling for a conclusion of the witness particularly.

Mr. Lewis: I asked him whether he knew.

Mr. Angland: Particularly with reference to '45. He testified he wasn't there only a few days in January.

Mr. Lewis: I will withdraw the question and rephrase it.

Q. Mr. Anderson, has or has not the operations since you became familiar with them after you returned from the Army been conducted on the Anderson lands and equipment in accordance with the terms of the agreement that was outlined to you prior to your going overseas?

A. It has been, yes.

Q. Each year? A. Each year.

Q. And you know, whether or not, except for '45, whether or not your mother and your brother as well as yourself have performed important and necessary services in the conduct of that partnership? A. Yes, they have. [232]

Q. Would it be possible for any person who is not trained in mechanics and in the use of farm machinery to have done the work that you have done since the formation of this partnership?

(Testimony of Noel J. Anderson.)

A. They wouldn't have been able to do all of it, no.

Q. And would that be true of experience in the handling of cattle, like branding and so forth in handling cattle? A. Yes.

Q. Do you know, Mr. Anderson, whether or not the record there shows that you have fully paid for your share in the partnership?

A. I believe it does.

Q. And do you know about when that was?

A. No, I couldn't say the exact date.

Q. Was there any understanding between you and your father as to when you would get a deed or any other evidence of your ownership in any part of the property, was there any understanding at the time the partnership was talked over?

A. We weren't to get any deed or anything until we had fully paid for our share.

Q. Have you received a deed for your one-sixth share in the real estate? A. I have. [233]

Q. I hand you Plaintiff's Exhibit No. 22 and ask you to examine it.

Mr. Angland: That is an exhibit that is in evidence?

Mr. Lewis: I was just going to ask him.

Q. Is this the deed that you received?

A. It is.

Q. Covering your share in the real estate?

A. Yes, sir.

Q. Mr. Anderson, has there ever been any conferences of any kind between the various members

(Testimony of Noel J. Anderson.)

of the partnership during the time since you returned from the Army with reference to policies to be adopted in the conduct of the partnership affairs?

A. Yes, there has.

Q. And who was present at those conferences?

A. The entire family.

Q. That would be your mother and father and your brother, Robert, and yourself?

A. Yes.

Q. And where did they occur?

A. At home.

Q. When, for instance, if you can recall, have they occurred, or on what occasion, why would they be called?

A. Well, purchase of new machinery or, well, land or anything. [234]

Q. Was that thoroughly discussed in those conferences or not? A. It was.

Q. And was a decision, any decision to act in a particular way made as a result of those conferences or at those conferences?

A. Yes, there always was a decision made.

Q. And who had part, if you know, in the determination of what you were going to do?

A. We all had a part in it.

Q. And after you had discussed it was that when the decision was made? A. Yes.

Q. Is that or is it not true on any matter or policy or purchase of additional land or the sale of a quantity of crop for any particular year, does it enter into that that may be in storage?

(Testimony of Noel J. Anderson.)

A. Yes, everything that the partnership, every business the partnership transacts.

Q. Will you state whether or not you have had an active part in those discussions?

A. I have.

Q. What about your brother?

A. He has too. [235]

Q. What about your mother?

A. Well, on discussions on which farm machinery to buy she doesn't know much about it so all she can do is listen but she is there.

Q. She listens in on it? A. Yes.

Q. What about when you mention the purchase of land, what about that?

A. She has her voice in that.

Q. And how often do such conferences occur?

A. There is no set time or how often, just whenever they come up.

Q. Whenever there is a problem comes up on purchasing a large piece of machinery or purchase of more land? A. Yes.

Q. Or the sale of stored wheat, any other such a problem that is a matter of interest the entire partnership, is that right?

A. Yes, that is true.

Q. Mr. Anderson, does the account there of yours include earnings for the year '45? A. It does.

Q. You shared in that even though you were in the service? A. That is right.

Mr. Lewis: You may cross-examine. [236]

NOEL J. ANDERSON

Cross-Examination

By Mr. Bowen:

Q. Mr. Anderson, turning to your statement in '38 you started doing a full man's job or rather a man's job on the ranch, how old were you in '38?

A. 12 years old.

Q. You mean at age 12 you began doing a full man's work on the ranch? A. I did.

Q. And that involved driving truck, for instance? A. Yes.

Q. Would that be true say to Fort Benton, down to Loma?

A. Wherever I could travel without a driver's license.

Q. That would restrict your operation considerably, wouldn't it? A. No, it would not.

Q. You couldn't come to Fort Benton, could you? A. I didn't have any reason to.

Q. Could you go to the several stations to carry wheat in that locality?

A. In the year '38 we hauled wheat to Virgil and there is no highway connected.

Q. You mentioned that you helped with repairs up until you went into the service in '44, that is a correct statement, is it? [237] A. Yes, sir.

Q. And that after you returned you began taking over the bulk of the repair work except the heavy work that had to be taken to town?

A. Yes.

(Testimony of Noel J. Anderson.)

Q. I don't believe we established your first school year down at Montana State?

A. The winter of '43 and '44.

Q. You went there—when does the school term begin there?

A. I believe that year began September 25th.

Q. September 25th of what year?

A. '43. That is somewheres close.

Q. Did you go down earlier that year to take part in rushing activity?

A. I was a freshman that year. Well, I hadn't completed high school when I went down to college.

Q. And you completed your first year at Montana State in about June, '44?

A. That is right.

Q. Is that correct? A. Yes.

Q. You refer to certain work performed on the ranch in the summer of '44, were you paid for those services?

A. I don't believe I was in '44. [238]

Q. If we were to refresh your recollection and show you in '44 your income tax return which refered to wages paid to you, would that help your recollection whether or not you were paid wages the summer of '44?

Mr. Lewis: If the court please, I think that is improper; if he has that material I think it should be shown to the witness.

Mr. Bowen: May I have your '43 return, partnership return?

(Testimony of Noel J. Anderson.)

Mr. Lewis: Here is the partnership of A. E. Anderson & Sons.

Mr. Bowen: That would be the only one, wouldn't it?

Mr. Lewis: Is that the one you are referring to?

Mr. Bowen: Necessarily.

Q. Before we get into that further, Mr. Anderson, you state that in '44 you did half the work relative to planting, is that correct?

A. Yes, sir.

Q. And your brother also aided you?

A. Yes.

Q. Who else helped you with the planting in '44?

A. I don't remember whether we had a hired man that year or not.

Q. Did your father help with the planting in '44? A. I don't believe he did. [239]

Q. Who did the other half?

A. If I did half and my brother did half, that is all of it.

Q. Oh, Robert did the other half? A. Yes.

Q. How many acres in cultivation in '44?

A. 1,100 about.

Q. Each of you planted roughly 550 acres of wheat? A. Yes, sir.

Q. This '44 return refers, Mr. Anderson, to labor hired $5,261.80, to whom could those wages have been paid if it weren't you or your brother?

A. We must have had hired man.

Q. Do you think you would pay a hired man $5,200.?

(Testimony of Noel J. Anderson.)

A. Could have had more than one, too.

Q. Just now you said you didn't recall?

A. I said I didn't recall; I didn't say we didn't have one.

Q. Can you state positively you didn't get paid wages for your work in '44?

A. I may have received wages for helping with the harvest.

Q. Do you have any idea how much those wages would be? A. No, I don't. [240]

Q. Do you deny that you were paid wages for the work you did in planting? A. Yes, I do.

Q. Then after your ranch activity after the summer of '44 was your induction into the service in September that year, wasn't it?

A. Yes, it was.

Q. So then you were home in '44 only from June to September, is that correct?

A. That I believe would be correct.

Q. You referred to your delay enroute visit in the latter part of January, '45, how many days was it you said you were home?

A. I don't remember exactly but I don't believe I was actually at home more than three or four days.

Q. A very short time? A. Yes.

Q. You had no anticipation at that time of being released from the armed forces, did you?

A. Well, I knew I would get out some day but I didn't know when.

Q. With reference to the account book which

(Testimony of Noel J. Anderson.)

you have testified about, Mr. Anderson, allegedly reporting the allocable interest to each of the alleged partners here were concerned, do you recall whether or not you had any withdrawals in '44?

A. No, I didn't have any withdrawals. [241]

Q. You didn't have any withdrawals?

A. I wasn't there in '45 except for the income tax that was withdrawn.

Q. Referring to the income tax, you were here yesterday when your father testified that he signed that return, isn't that correct?

A. That is correct.

Q. Does he customarily sign your income tax returns?

A. He doesn't customarily but when I am not there—I was over in Lehti—well, I don't know just where I was but anyway I wasn't home.

Q. You say you got out of the service, you were discharged, I believe, January 6th, '46—either January 5 or 6? A. Yes.

Q. The income tax return which is in evidence was dated January 15th, '46; are you aware that it is your responsibility to sign your own income tax return?

A. If it wasn't signed by me, I wasn't home.

Q. If it wasn't signed by you, you say—I hand you your '45 income tax return, does your signature appear there? A. No, it doesn't.

Q. How is it signed?

A. Signed Noel Anderson, Jr.

Q. By whom?

(Testimony of Noel J. Anderson.)

A. By Noel Anderson. [242]

Q. By Noel Anderson; in other words, you didn't? A. That is right.

Q. Did your father likewise sign your '45 State income tax return?

A. I suppose he did; I wasn't there.

Q. Did he your '45 income tax?

A. It was paid out of the joint partnership account.

Q. How was it paid, do you recall? To refresh your recollection, I am not trying to cross you up, your father stated in testimony yesterday it was paid by his check, is that correct?

A. Yes, that is right. There was no partnership account in '45.

Q. That is right. With reference to the partnership account of Noel Anderson & Sons which was stipulated to have been opened for the first time May 1, '46, were you authorized to draw against that account?

A. No, that was my father's and he takes care of the books and runs our errands for us and we do the work.

Q. When you wanted a portion of your alleged interest in this partnership income then you had to go to your father and get him to write a check for you, is that right? A. That is right.

Q. Were you restricted in the manner?

A. We were restricted to our needs until our share in the partnership had been paid and from then on we have not been restricted. [243]

(Testimony of Noel J. Anderson.)

Q. By needs I presume you would refer to your college needs, your clothes and that sort of thing?

A. That is right.

Q. You have referred to conferences had between the members of your family and you included Mrs. Anderson and all those conferences, of course, which you refer to were after your return from the service in '46, were they not?

A. Well, we had conferences before that.

Q. But I mean conferences as a partnership?

A. Well it had to be because I wasn't there in '45.

Mr. Bowen: No further questions.

NOEL J. ANDERSON

Redirect Examination

By Mr. Lewis:

Q. Mr. Anderson, you made the statement that if your return in '44, in '45 I should say, showed signature by your father that you were not home so that you could sign it? A. Yes, I believe.

Q. Would you state whether or not you have signed all the other returns from that time on?

A. To my knowledge I have. [244]

Q. I call attention particularly to the fact that you may have had some wages for helping with the harvest of '44? A. Yes.

Q. Do you know who received the crop for '44?

A. For '44, well, the crop that was harvested in

(Testimony of Noel J. Anderson.)

'44 was part of the A. E. Anderson estate, A. E. Anderson & Son partnership.

Q. You meant to say then, if you received any wages then in '44, that it was for work performed for the partnership of A. E. Anderson & Sons, is that right? A. That is right.

Q. But this work you were telling about for preparation for '45, that you told about in detail that crop was harvested by the new partnership?

A. It was.

Q. And did you get credit for your share in the earnings that hear from that crop?

A. In '45, yes.

Mr. Lewis: That is all.

The Court: We will take a recess. (3:05 [245] p.m.)

(Court resumed, pursuant to recess, at 3:15 o'clock p.m., at which time all counsel and parties were present.)

ROBERT M. ANDERSON

was called as a witness for plaintiff, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lewis:

Q. Will you state your name and age?

A. Robert M. Anderson. Twenty-five.

Q. Where do you live, Mr. Anderson?

A. I live on the Noel Anderson & Son ranch.

Q. In Chouteau County, Montana?

(Testimony of Robert M. Anderson.)

A. That is correct.

Q. How long have you lived there?

A. Well my residence has been there all my life. I have lived there all my life except when I was in school.

Q. And were you away for any other purposes.

A. Well, I have been in the service twice.

Q. Now that is the land that is involved in this partnership proceeding here, too?

A. That is correct.

Q. And what is your occupation, Mr. Anderson?

A. I am a farmer and rancher. [246]

Q. And where were you born?

A. I was born in Fort Benton.

Q. Then if you have lived on this farm all your life, you spent your childhood there as well as later years? A. That is right.

Q. What are your parents' names?

A. Noel Anderson and Agnes Anderson.

Q. And Noel Anderson is the plaintiff in this action? A. That is right.

Q. Are you married, Mr. Anderson?

A. I am.

Q. And when were you married?

A. February 21, '50.

Q. Do you have any children?

A. I have one six.

Q. And is your family making their home with you on the ranch? A. They are.

Q. Have you done work on that ranch, Mr. Anderson?

(Testimony of Robert M. Anderson.)

A. Yes, I have. I have worked there ever since I have been big enough to work. [247]

Q. And when was that?

A. Well in '39 I remember I drove a truck in harvest. I say that I actually started a man's work in running a tractor in '42.

Q. And what has been the nature of your work?

A. Well, we do, my brother and I work on the farm and carry out the summer following, haying operations and take care of the cattle.

Q. How long has that been true if that was your work? A. Well, at least since '42.

Q. Do you know who operated the ranch at that time? A. In '42?

Q. Yes. A. A. E. Anderson & Son.

Q. Was that A. E. Anderson—who was that?

A. He was my grandfather.

Q. Your grandfather, your father's father?

A. That is right.

Q. And how long did you work for that partnership? A. Well, at least two years.

Q. Were you here in Chouteau County at the time of your grandfather's death?

A. Yes, I was in high school at that time.

Q. And it occurred when?

A. Christmas Eve '43. [248]

Q. And who operated the ranch for the year following your grandfather's death?

A. The year '44, you mean?

Q. Yes.

(Testimony of Robert M. Anderson.)

A. I believe that was carried on as A. E. Anderson & Son.

Q. Do you know whether or not the crop for '44 was seeded prior to your grandfather's death?

A. It was seeded in the fall of '43.

Q. And that work on the farm so far as the crop for '44 is concerned was by the old partnership?

A. That is right.

Q. Now did you do any work on the farm that year in preparation of the '45 crop?

A. In '44 I graduated from high school and as soon as I got out of high school I went on the farm and worked.

Q. What was the nature of the work that year?

A. We were doing summer fallowing and put up some hay and took care of the cattle.

Q. And did you help any with the seeding or not that year? A. In '44?

Q. Yes. A. Yes, I did. [249]

Q. Who worked with you, if anyone?

A. Me and my brother.

Q. Noel J. Anderson? A. That is right.

Q. And what proportion of the seeding did you and your brother do on that coming crop?

A. Well, in seeding we usually run a double shift so I probably did about half and he did about half?

Q. And how many acres would that be?

A. Well, somewhere around 1,000 to 1,100.

Q. Were you away from the farm any during the year '44?

(Testimony of Robert M. Anderson.)

A. Well, as I said before, I was in high school in the spring of '44 up until probably the 20th of May until graduation and about, I would say about the 25th of September I went to school, went to college.

Q. Did you ever do any work on the farm with either the cattle or in the farming before the school year was up while you were in high school?

A. Well, I know I helped with the branding. Weekends I probably went out to the ranch. We made it a practice to do that when in school but not during the week when school was in session. [250]

Q. When you went out on the weekends what would be the nature of your work?

A. Well anything that my father or my grandfather, it would be my father in '44, that he saw fit to put us to doing.

Q. Did you go away in the fall of '44 or not?

A. Yes, I did.

Q. Where did you go?

A. I went to school at Montana State College.

Q. What year was that? A. '44.

Q. And what year were you in college?

A. I entered in the fall of '44 and graduated in the spring of '48.

Q. Was your college course continuous each year? A. It was.

Q. And what would happen in the spring of other years as well as '44? Now what would happen if anything in '45 in the spring with reference to the ranch?

(Testimony of Robert M. Anderson.)

A. Well, branding time the middle of May if it was at all possible for me to get home, I would get home for branding and as soon as I got out of college, as soon as the semester let out I would go home and work on the farm during the summer.

Q. And when was it the school was say out?

A. Somewhere between the 1st and 6th of [251] June.

Q. And in '45 what did you do then?

A. As soon as the school term was out I went home to the ranch and worked all summer.

Q. Do you know when your brother entered the service? A. September of '44.

Q. And do you know how long he was away?

A. He came back sometime in January of '46.

Q. And who worked on the farm in '45 other than you then?

A. Well, my dad worked there and we had a hired man.

Q. Do you know anything about any work your mother did on the farm in '45?

A. In '45 she drove the Chevrolet pickup in the harvest.

Q. That would be doing what?

A. Hauling wheat.

Q. Explain just what you did in the farming operations in '45? A. Myself?

Q. Yes.

A. Well, when I got home in '45 the plowing would have been done. From then on we summer fallow and cultivated the land throughout the sum-

(Testimony of Robert M. Anderson.)

mer, and I helped with the harvest and seeded the crop that fall. I worked with the cattle and did the riding that was necessary. [252]

Q. Was there anyting different in what work you did in '45 from '44? A. None.

Q. About the same work? A. Yes.

Q. And state whether or not the work you did on the summer fallowing and the seeding in the fall of '44 was for the crop of '45?

A. It was for the crop of '45.

Q. What do you have on the farm besides the wheat farming operations?

A. We have quite a few cattle.

Q. How many did you have then?

A. Well, I couldn't say exactly, probably 150 cows.

Q. And what is the usual amount that you run on this land?

A. Well, somewhere around 150, maybe 200.

Q. And is there any river by the land that is used in connection with the livestock operations?

A. Yes, there is.

Q. What is done with that?

A. Well, we cut hay there when there is hay to be cut.

Q. Do you know what that land is, the name of the former owner?

A. That belonged to Billy Kingsbury. [253]

Q. What sort of machinery do you operate on the farm?

A. Well, I drive any of the tractors, mowers,

(Testimony of Robert M. Anderson.)

trucks, anything, just about any piece of machinery on the farm.

Q. What kind of tractors?

A. I usually run a rubber wheeled tractor.

Q. And have you had any experience in the repair of tractors? A. Yes, I have.

Q. What happens when you are working in the field with reference to a breakdown? What do you do if your machine breaks down?

A. Well, fix it if possible.

Q. State whether or not you usually get it fixed or whether you take it into town?

A. Well, unless it is a breakdown that is beyond the scope of our shop we fix it ourselves.

Q. You maintain an equipped shop on the farm?

A. Yes, we do.

Q. And are there enough tools and equipment there to do the necessary repairing for tractors?

A. Yes, there are.

Q. And other pieces of machinery?

A. Yes, sir. [254]

Q. And is it part of the partnership?

A. It is.

Q. Was there a shop there under the old partnership?

A. Yes, my dad always use to do the repair work.

Q. And has there been a shop maintained since the beginning of '45 and since?

A. That is correct.

(Testimony of Robert M. Anderson.)

Q. How many acres do you farm with the, for wheat and other grains?

A. Oh, approximately 1,000 to 1,100 in crop a year.

Q. Each year? A. Yes.

Q. Total it up to 2,200?

A. Possibly more now but at that time about that.

Q. And is there hay land that has been cut over in addition to that? A. There is.

Q. State whether or not your brother worked with you in the operations that you described here during the years, your brother Noel J.?

A. Yes, he did, except in the year '45 when he was in the Army.

Q. Did you ever talk with your father about becoming a partner in this enterprise?

A. Yes, when I was home from college at Christmas time '44 and sometime during the time that I was home and the time I went back we discussed forming a new partnership. [255]

Q. And were there any details discussed at that time?

A. Well, the details weren't what you would say elaborate; it was set on what share we would receive for our services and the manner in which we would receive our share of the partnership and pay for it.

Q. And was the shares in that partnership as it was discussed at that time?

A. My brother and I were each to receive one-

(Testimony of Robert M. Anderson.)

sixth of the income and my father and mother were each to receive one-third.

Q. And were you to, what about any purchase on your part, was there to be any?

A. We were to pay for one-sixth of the appraised value of the partnership.

Q. And what did that include?

A. That included all the land and cattle on the farm.

Q. Farm machinery? A. Correct.

Q. Equipment? A. Yes.

Q. Entire ranching operations?

A. That is right.

Q. And was it to include the land, all the land?

A. That is right. [256]

Q. Was there any State land under lease at the time? A. Yes, there was.

Q. Was it to include that or not?

A. It was to include that.

Q. Now how were you to pay that? You say the appraised price? What do you mean by that appraised price?

A. Well, the figure my father used was the figure arrived at when the estate of A. E. Anderson was appraised.

Q. And it was on that basis that you formed a partnership? A. That is right.

Q. Was the agreement definite as to when it was to begin?

A. It was to begin on January 1st, '45.

(Testimony of Robert M. Anderson.)

Q. And what was the arrangement about the '45 crop?

A. We were to share one-sixth in the income for '45.

Q. That would include the cattle income?

A. That is right.

Q. And the other income, is that right?

A. That is right. [257]

Q. Now do you know whether the farm was conducted in '45 under that agreement?

A. Yes, it was.

Q. You had a part in it? A. I did.

Q. And you received credit for one-sixth share of all of the earnings in '45, is that right?

A. That is right.

Q. Or as it was turned into cash?

A. Right.

Q. Do you know how the books of the partnership were kept?

A. I am familiar with them in a general way, yes.

Q. How are the receipts and expenditures kept?

A. Well, the receipts and expenditures are entered in a book; its a cash book, I believe.

Q. I will show you Plaintiff's Exhibit 9 and ask you if you know whether that is the book or not?

Mr. Angland: Mr. Lewis, I was going to suggest something here. I don't want to in any manner suggest that you cut off the examination of this witness but I thought that both sides might expedite this matter if we stipulated this witness's deposition has

(Testimony of Robert M. Anderson.)

been taken, and either party in submitting this matter to the court can use any part of it or all of that deposition. I think you are going into matters that are covered in the deposition. Now I am not suggesting you shorten that in any way but I am suggesting the possibility. [258]

Mr. Lewis: I think we can get along pretty rapidly from now on. We are reaching the end of our case now.

Q. Are you familiar with that book?

A. Yes, I am.

Q. Do you know of your own knowledge whether Plaintiff's Exhibit 9-a and Plaintiff's Exhibit 9-b, 9-c, 9-d and 9-e contain the cash record, the record of the cash received and expended during the year '45? A. That is correct.

Q. And do you know whether this is the book that contains the record of the partnership for later years?

A. Yes, I believe the book is carried on for '46, '47, '48.

Q. Mr. Anderson, I hand you Plaintiff's Exhibit 12 and ask you to examine that and state whether you are familiar with, particularly with page 62?

A. Page 62 is a detailed entry for each year since '45, January 1st, '45, of all my credits and withdrawals.

Q. And do you know about page 60 as to whether that represents another member of the partnership?

A. Those are the credits and withdrawals of my brother, Noel J.

(Testimony of Robert M. Anderson.)

Q. And are you familiar enough to state whether you know what page 58 is?

A. 58 is a similar page reflecting the withdrawals and credits of Noel and Agnes Anderson. [259]

Q. Now if you will go back to page 62, your own account, what is the first item there?

A. January 1st, '45, is the date; its entitled "share in partnership $7500.00."

Q. That was charged against you in this record, was it? A. That is right.

Q. Is that in accordance with the partnership agreement? A. It is.

Q. Now there is another item there "cash drawn," page 1, is $855. Do you know what that is?

A. Well, page 1 is, dad keeps a separate page for each year of any money that we withdraw, and page 1 is the money I drew in '45.

Q. Then it is carried forward to page 62 as one lump sum? A. That is right.

Q. Now will you examine through the other pages and see whether or not that is followed in other years in the same manner and whether it is followed for your brother?

Mr. Anglund: I am going to object to any further evidence on this. I think the record speaks for itself. There is a reference in each instance to the page. [260]

Mr. Lewis: I do think we can shorten it.

Mr. Anglund: The records are in evidence and I think they speak for themselves. I note the witness has just referred to that first entry which re-

(Testimony of Robert M. Anderson.)

fered back to page 1, and I take it the second entry is going back to page 2 and so on, so it is a recitation by the witness of what is in the book.

The Court: What he wants to do is show the familiarity of the different partners of the partnership of the account and call it to their personal attention. It is in the record all right, in evidence now. Well, proceed as fast as you can.

Q. (By Mr. Lewis): Mr. Anderson, I will ask you whether or not if you know the left-hand side of page 62 of Plaintiff's Exhibit 12 contains all of the charges made by the partnership against you for your share in the partnership and for your withdrawals, including your payments for your individual income tax, state and federal, from the beginning of the partnership January 1st, '45, down to the close of the year '51, and including the payment of the '51 tax, federal and state?

A. I believe it includes through the year '50.

Q. '50? A. '50.

Q. I am sorry. Did I say '51? A. Yes.

Q. I meant to say '50. It includes through the year '50? A. Right.

Q. And includes the payment for the tax, taxes for '50? A. That is right.

Q. Now on the other side of the page, the other column, what does that represent, if you know?

A. That is my share in the partnership earnings for each of the years starting with '45, through '50.

Q. Do you know the handwriting in that book?

A. That is my father's.

(Testimony of Robert M. Anderson.)

Q. Wherever you have noticed is your father's? Just glance through it and state whether or not it is your father's handwriting, if you know?

A. All of it that I see is my father's handwriting.

Q. Mr. Anderson, have you received enough in profits to pay for your share as agreed upon in the partnership? A. I have.

Q. Did you have any knowledge when you might get any title to the land or was there any agreement as to that effect?

A. Well at the time the partnership was formed in January 1st, '45, we knew that we would not get deeds for the land until our share in the land and the cattle [262] were paid for.

Q. And when was it paid for about?

A. About '50.

Q. I will show you Plaintiff's Exhibit No. 23 and ask you if you recognize what it is?

A. This is the deed that I received from my father and mother for an undivided one-sixth interest in the real estate.

Q. Mr. Anderson, what have you to say about the work that you and your brother have been doing in handling the machinery and in the handling of the cattle as to whether if someone took your place whether he would have to be an expert with experience to do the type of work you and your brother have been doing?

A. Well he wouldn't have to be an expert; it

(Testimony of Robert M. Anderson.)

would be desirable that he at least have some experience; you can put a hired man in to doing our work if you watch him, yes.

Q. So, of course, that makes the farming operations more profitable than if you had to depend on hired help alone?

A. Well, yes, any man knows that if you are working for yourself, you are going to take a lot better care of the machinery and see to it that there aren't repair bills that aren't necessary; a hired man doesn't care whether he turns it up or [263] not.

Q. And do you know whether the business was conducted in '45 by the new partnership of Noel Anderson & Sons? A. Yes, I do.

Q. Was it?

A. Yes, it was. I was there when I wasn't in school; I observed the farm operation and observed my father at times keeping books.

Q. Was it conducted in accordance with the agreement that you entered into at your Christmas time meeting in '44? A. It was.

Q. Did your mother do any specific work in the year '45 in connection with the farm work?

A. I believe I testified that she drove the Chevrolet pickup in the harvest in '45.

Q. And what was that used for?

A. For hauling wheat to town.

Q. And do you know whether or not she has done any other outside work during the years?

A. Well, she is always there when we brand to

(Testimony of Robert M. Anderson.)

help cook for the crew. She always has been there when we branded and she is available for errands.

Q. Do you have a big crew in branding time?

A. Yes, we do.

Q. How big?

A. Oh, 10, 12, maybe 14. [264]

Q. Do you remember whether you took part in the branding operations in '45?

A. Yes, I did. I came home from school.

Q. From college? A. Yes.

Q. Especially? A. Yes, I did.

Q. And then did you go back after that part of the work was over?

A. I went back and finished my quarter of school, yes.

Q. Now has the work that you have described that you and your brother have done, been done by both of you since the partnership was formed each year except when your brother was in the military service? A. That is right.

Q. Mr. Anderson, when did you first enter the miiltary service? A. October 14th, '48.

Q. And how long were you in?

A. I was released December 1st, '49.

A. And did you re-enter the service after that?

A. I went in the service on the 8th of October, '51.

Q. And when were you discharged?

A. On the 10th of November, '52.

Q. And where were you during that period?

A. I was in the Army. [265]

(Testimony of Robert M. Anderson.)

Q. And where were you stationed?

A. Well—in both periods?

Q. No, particularly in the latter period. We won't go into detail.

A. Well, in October I went to Fort McCord, Washington. I stayed there until January, '52. I was sent to Fort Belvedere Engineering School and as soon as I completed that I was shipped to Germany.

Q. How long were you in Germany?

A. Approximately four months.

Q. Did you enter the Army this last time of your own accord?

A. Well, I have to say partially yes because I am a member of the reserve and when I signed reserve papers I said I would go into the Army if called. However, I did not volunteer for active duty.

Q. And if you hadn't been signed up for reserve, would you have stayed on the farm this last service or gone into the Army?

A. In all probability I probably could have stayed there.

Q. On the farm? A. Yes.

Q. Do you know anything about your father's health during these years?

A. Well, both my brother and I have known for a number of years that my father has heart [266] trouble.

Q. And does that prevent him from doing a lot of heavy work or not? A. Yes, it does.

(Testimony of Robert M. Anderson.)

Q. And has it through the years?

A. It has.

Q. Because of that what have you to say as to whether or not you boys have taken on more of the burden of the work than you would otherwise?

A. Well, since then, particularly since the time of my grandfather's death my father has more or less assumed the role of manager and director of the operations while my brother and I and hired men do the work.

Q. What proportion of the work for the crop of '45, the actual work up to the time the harvest was began did you and your brother do in '44 before you left?

A. Well, we had one hired man that year, I believe, so three of us working would be about 30%, I believe; at least 60%.

Q. That would be on summer fallow?

A. Right.

Q. I am talking about the '44 work. You had a hired man in '44, I believe you said. And then what about the seeding?

A. I believe my brother and I did the seeding ourselves. [267]

Q. And was there need for much work to be done in '45 on the crop for '45?

A. Just harvesting.

Q. And you took part in that?

A. I did.

Q. Mr. Anderson, a stipulation shows here that

(Testimony of Robert M. Anderson.)

you had a bank account in the Choteau County Bank; do you know when that was opened?

A. I believe my first bank account in the Choteau County Bank was after I got out of the Army the first time, which would be in December of '49.

Q. Now did you have any other bank accounts of your own prior to that time?

A. Yes, I did.

Q. And when?

A. Well, I don't remember whether I opened the bank account my first quarter of school in college or not, but at least the next year I opened bank accounts in the Security Bank and Trust Bank in Bozeman, Montana.

Q. And how long was that maintained?

A. Well, I opened the bank account in the fall of the year when I went down to school. I usually took money with me and I deposited the money, and I maintained my account until I left school for that year, at which time I would usually have spent all the funds so I closed it. [268]

Q. What happened then again in the fall?

A. I would open another one.

Q. And did that happen clear through your college years? A. Yes, sir.

Q. And then you didn't have an account while you were in the service, at least in this part of the country.

A. Not in this part of the country. I maintained bank accounts at all times when I was in the service.

(Testimony of Robert M. Anderson.)

Q. And deposited whatever money came to you from any source? A. That is right.

Q. Are you familiar with how the expenses and purchases of any machinery, new machinery have been paid for in the partnership account, what accounts they have been paid for out of?

A. They are paid for out of the joint account of Noel Anderson & Sons.

Q. Partnership account?

A. That is right.

Q. Mr. Anderson, did you, have you had any conferences of any kind with members of the family partnership, your father and mother and Noel, Jr., and yourself, since the formation of the Noel Anderson & Sons partnership on January 1st, [269] '45?

A. Well, I think I could say that generally as a rule between my father and my brother and I we are in conference all the time. We may not be all together at one time but particularly in the purchase of machinery if I am living at the ranch and come in and stop at the house maybe dad has some literature on tractors and I look at it and we talk about it, and just in general we talk about all of our operations of the farm.

Q. And as a result of those conferences is there action taken?

A. Well, if we have something definite in mind, yes.

Q. And is that as a result of coming to agreement? A. Yes, it is.

(Testimony of Robert M. Anderson.)

Q. By various members of the partnership?

A. Yes.

Q. Is your mother in on any of those conferences?

A. Well, on the purchase of land or any large transaction she would be in it; carrying out the farm work why ordinarily not.

Q. Has there been such a conference since the partnership was formed?

A. Yes, there was, a conference on some [270] land.

Q. Was she in consultation on that?

A. She was.

Q. And what was the result of your discussion on that, did you agree what your policy would be?

A. We did.

Q. And did the partnership follow out that agreement?

A. Yes, we did; we purchased that land.

Q. Has that been common practice ever since the partnership was formed? A. Yes.

Mr. Lewis: I think that is all. You may cross-examine.

ROBERT M. ANDERSON

Cross-Examination

By Mr. Bowen:

Q. Mr. Anderson, you stated you graduated from high school May 20, '44, is that correct?

A. I don't recall. I said somewheres around there. I don't remember the exact date.

(Testimony of Robert M. Anderson.)

Q. Sometime the latter part of May, '44?

A. That is right. [271]

Q. At which time you were how old?

A. Sixteen.

Q. Sixteen and graduated from high school the latter part of May, '44? A. I was.

Q. During the other years—college students at Montana State college are allowed to join fraternities in their freshman year, were they not?

A. They were.

Q. You left for college in early September of '44, didn't you?

A. Somewhere around the 25th is when freshman week is held at Montana State.

Q. Did you go up early for any fraternal rushing activities?

A. They did not have such things at Montana State. The fraternal rushing is held during freshman week which is usually the last week in September.

Q. At that time I presume you intended to graduate, did you not? A. I did.

Q. You stated in your deposition referred to earlier, taken last October 3rd, that you were taking a course in what type of engineering?

A. Industrial. [272]

Q. Industrial engineering?

A. That is correct.

Q. October, '51. I stand corrected.

A. What was October, '51?

(Testimony of Robert M. Anderson.)

Q. That was the date of the deposition instead of last October. What did you have in mind in taking an industrial management course?

A. Well, as I testified on the deposition——

Mr. Lewis: I think, if the court please, if he is going to refer to the deposition he ought to get the exact statement so that——

Mr. Bowen. I am trying to refresh his recollection; I am not trying to cross him up.

Mr. Lewis: Turning to the particular part, if the court please, would be the proper procedure.

Q. Do you need your recollection refreshed?

A. No, I didn't need it refreshed. I know just exactly what is in there.

Q. What did you have in mind?

A. It has been proved time and time again in ranching that it is not necessarily the failure in the methods employed in farming but it is the management that causes failure in farming.

Q. So it was important to you that you get that training?

A. It was important that I get training in management, and I also had other things, and sometimes [273] a farmer's health goes bad and he can't farm all his life.

Q. You graduated in '48, June of '48?

A. That is right.

Q. And at that time you were awarded a reserve commission, Army Reserve Commission, is that right? A. That is right.

Q. You were in active R.O.T.C. work the entire

(Testimony of Robert M. Anderson.)

four years? A. That is right.

Q. Were you ever away in an R.O.T.C. summer camp? A. I was away in '47.

Q. '47.

A. It would be the end of May, junior year.

Q. Summer of '47. You noted, Mr. Anderson, on direct that if it were possible you would come home from school to help with the branding, is that right? A. That is right.

Q. Did you as a matter of fact come home for the branding in the spring of '45?

A. I know I did.

Q. You are sure of that?

A. That is correct.

Q. You recall the testimony relating to your father signing your income tax return January 15th, '46, do you not? A. I do. [274]

Q. Which return relates to income earned in '45. A. That is right.

Q. And it is true then that he signed that return, signed your name by himself and paid the tax by his check?

A. That is right. I was not home to sign the return.

Q. If you can come home for spring branding in '45, can't you come home for as important a matter as signing, filing and signing your own income tax return a year later in '46?

A. I suppose I could have.

Q. How far is Bozeman from here?

A. 200 miles.

(Testimony of Robert M. Anderson.)

Q. Is it customary that your father at least at that time transacted such business as this for you?

A. In '45 when the partnership was formed he transacted a lot of business in his own name and the old partnership name because at that time there wasn't a bank account of Noel Anderson & Sons.

Q. We discussed with your brother, Noel, Jr., the help that you had on the ranch on the summer of '44 and it was pointed out at that time that the A. E. Anderson partnership return for the period '44 showed wages paid of $5,000.00, does that help you recall the number of farm hands you had at that time? [275]

A. In '44 we had one hired man that helped with the field work and we had another hired man who was my grandfather's brother that did fencing and helped with the haying.

Q. Were you paid wages for the work performed in the summer of '44?

A. I very possibly was paid wages for harvest. I don't know whether I was or not but it is very possible that I was.

Q. In his testimony your brother, Noel, Jr., stated that he aided in repair work up until his entry in the service in '44 and thereafter did a considerable amount of it, did you aid in repair work? A. When?

Q. Up to and including the year '45?

A. Well, yes, any time when you are doing farming you have repair work to do.

Q. When is the bulk of the repair work done?

(Testimony of Robert M. Anderson.)

A. The major repair work such as tractor repair is done in the winter time.

Q. So you would be away at college?

A. For major repair work you remember any time you pull a piece of machinery in the field you do repair work.

Q. By repair work you mean assembling it?

A. Suppose you take a rod weeder out in the field and you bend a rod. [276]

Q. I say that is the type repair work you refer to? A. Yes.

Q. You stated, Mr. Anderson, on direct just now that for some time you had known that your father had a heart condition, could you pinpoint that time a little closer?

A. Well, I will be conservative and say '40.

Q. Since '40?

A. I knew it before that but I will say '40.

Q. You have referred to conferences with the members of your family, your mother, Noel, Jr., and your father, respecting purchases of machinery, purchases of land, leasing of land and that sort of thing, when did those conferences occur?

A. We don't conduct conferences at a certain hour or day or anything; it goes on with the operation of our business.

Q. I misled you with my question. I mean what period, what year. I don't mean the hour or day.

A. Starting with '44 when we formed the partnership and continuing from then until right now.

(Testimony of Robert M. Anderson.)

Q. Well, of course, it has been brought out that your brother Noel was not even in the State in '45 and that you were away in school in all but three months of '45, when did you confer? [277]

A. When I was there.

Q. I see, when you were there and something would come up?

A. My folks occasionally visited me at the school and we wrote letters back and forth concerning the operation of the business and in general I knew everything that was going on and was perfectly satisfied with it.

Q. You were 17 at that time, were you not?

A. In '45.

Q. 16 in '44; you graduated from high school.

A. I was 17. I was 18 in June, '45.

Q. And a freshman in college? A. Yes.

Q. Did you think your father deferred to your judgment very much in those days?

A. He was acting as manager of the partnership; that was his job. I respected his judgment probably a little more than my own but at the same time he didn't shut me up when I had something to say. He had been farming for about 35 years at that time and I imagined he knew more about it than I did.

Q. Of course he would and I am sure you would defer to him. With reference, Mr. Anderson, to your withdrawals in '45, do you remember how those withdrawals were made; how was that money made available to you in this partnership, your

(Testimony of Robert M. Anderson.)

alleged partnership withdrawals in Noel Anderson & Sons? [278]

A. I don't follow just what you want.

Q. I believe that Exhibit 12 shows that you received $800.00, as I recall, as an alleged partnership distribution in '45, how was that money made available to you?

A. You mean how did I get it?

Q. Yes. A. I requested it.

Q. And your father would write his check and give it to you? A. That is right.

Q. And the purpose of these withdrawals was to pay your tuition in school and clothes and that sort of thing, is that correct?

A. Spending money.

Q. And spending money?

A. That is right.

Q. In other words, you were privileged so to speak to spend it for your needs and the rest was to stay in the business to pay for your purported partnership interest?

A. That is right. I was given the privilege of drawing the money that I needed for my schooling and reasonable amount of spending money.

Q. If you did run out of money, then you would write your dad and he would send you a check, is that right? [279]

A. I didn't run out of money very often.

Q. I am glad to hear of one college boy that has never run out of money.

(Testimony of Robert M. Anderson.)

A. I didn't say I never run out of money; I said not very often.

Q. You were a very fortunate student. Mr. Anderson, one final question, in this stipulation refered to, the October '51 stipulation, pages 45 and 46, you referred to the manner in which you expended your money, you would pay for things yourself, or he would give you the money and you would buy it, is that the idea?

Mr. Lewis: Just a minute.

A. What are we talking about?

Q. To refresh your recollection, referring you to page 44 of the deposition of '45, you refer there to the use of these withdrawals, these alleged partnership withdrawals? A. Yes.

Q. Could you state briefly for the court the manner in which the withdrawals were made and the use then that they were put to?

A. Well, starting with when I went to college usually before I went to school I made an estimate of what I was going to need for the quarter, whether it was three or four hundred dollars, whatever it happened [280] to be or maybe $25.00, and I told my dad what I needed and he would write me a check and charge me with that amount against my account.

Q. And you used that money for your—I am re-stating now but to clarify finally—you used that money to pay your college tuition, your books, your necessaries and clothes while in college, is that a correct statement?

(Testimony of Robert M. Anderson.)

A. It covered the majority of it, yes. I may have received money from his own personal account as a bonus or Christmas present or something but as a general rule the money that was drawn from either his account or the A. E. Anderson & Son account was charged against me in this book.

Mr. Bowen: No further questions.

ROBERT M. ANDERSON

Redirect Examination

By Mr. Lewis:

Q. Mr. Anderson, counsel for the Government asked you if you attended a training camp in '47. I think you said yes.

A. It was in '47.

Q. You testified you thought it was in '47. I don't think he asked you how long you were there. Would you state how long you were there? [281]

A. I believe it was six weeks from the day I left until the day I got back.

Q. Was that the only time you attended training? A. That is correct.

Q. And when was that? I mean during what part of the year?

A. Well, I left about around the middle of June sometime and I was back in time for harvest.

Q. In time for harvest? A. Yes, I was.

Q. Is there slack time normally in between the cultivation work in the spring for the crop for the year following and the start of the harvest?

(Testimony of Robert M. Anderson.)

A. Sometimes there is and sometimes there isn't.

Q. Is that the time while you are away sometimes in the slack work?

A. If there is slack time, it may be preceding harvest or it might be after harvest.

Q. This particular year Noel J. was there to help out, was he not? A. Yes.

Mr. Lewis: That is all.

The Court: Call the next witness.

Mr. Lewis: If the court please, that is all of our witnesses. There is a stipulation in the record, if the court please, that I would like to have introduced and given an exhibit number. I think there will be no objection. [282]

The Court: What is the stipulation?

Mr. Lewis: The stipulation refers to several things. It sets forth the amount of the deficiency tax and I won't go into too much detail but in general it does that, and what was paid that year, and then it ends up, and this is the particular part I would like to have to have in the record too and that is the reason that we, that the plaintiff asked for the stipulation. There were payments made by members of the family for taxes on the partnership for '45, of course, as the court knows, and until when the assessment was made, and we paid the amount of the tax under our protest. And then after they brought this suit, of course, the money that was paid to the other members of the partnership would of necessity be returned and it has been returned to them. And this stipulation covers that

point that if the decision should go in favor of the Government a certain thing would happen; if it goes in favor of the plaintiff a certain thing would happen with reference to that.

Mr. Angland: You mean if the plaintiff won this case, the plaintiff would have a refund coming from the Government, and the other three, Noel Anderson, Jr., Robert Anderson and Agnes Anderson would all have adjustment of returns. [283]

Mr. Lewis: That is right and it would have to be credited on the judgment that he may secure.

The Court: What about it? Any objection to it?

Mr. Angland: No objection.

The Court: Very well, it may be marked as an exhibit and numbered in the case.

Mr. Lewis: If the court please, I want to be absolutely sure before we rest that we understand each other about the exhibits. We have an agreement that we may withdraw any original exhibits and have them copied or photostated and certified, too; if photostated, they need not be certified, too, and the original exhibits might then be withdrawn, and I want that to be sure to include all the exhibits. The agreement we had included the privilege on the part of either side to furnish certified copies. For instance, like the deeds, it is very easy to furnish certified copies; in fact, I have them right here ready to furnish. On others like the leases on the land we could do that, we would have to photostat them, and we would probably photostat a part of the record books or at least they

would be copied so we could get the books and copy them as a permanent record. Now is there any objection?

Mr. Angland: No objection.

Mr. Lewis: With that understanding the plaintiff rests. [284]

The Court: Now, gentlemen, how long do you figure it will take you to put in your case? Can you do it tomorrow forenoon?

Mr. Bowen: Easily, sir.

The Court: Well I think we better suspend and you can talk things over and you can put in your case tomorrow morning.

Mr. Bowen: I might say to the court that the defendant has a motion to make since the plaintiff is closed. I think that might just as well be made first thing in the morning before the Government puts in any evidence.

The Court: Very well, that is understood. Court will stand adjourned until 10:00 o'clock tomorrow morning. (4:45 p.m. 12/12/52). [285]

(Court resumed, pursuant to recess, at 10:00 o'clock a.m. on December 13, 1952, at which time all counsel and parties were present.

The Court: Good morning, gentlemen. Are you ready to proceed this morning? You have a motion you say?

Mr. Angland: Yes, your Honor.

The Court: Very well, present your motion.

Mr. Bowen: If it please the court, counsel for the defendant moves the court in accordance with

Rule 41(b) of the Federal Rules of Civil Procedure to dismiss the action upon the grounds upon the facts and the law the plaintiff has shown no right to relief.

The Court: Very well. I anticipated this motion and looked up some of the authorities. This is a rather unusual and rather a complicated case, a family partnership was recognized by the revenue department at the death of one of the partners, the original partners, and the ordeal of the probate of the estate and the length of time it took, and all that sort of thing, and all those complicated situations that have arisen, I have considered all that, and also some of the authorities which counsel have based their motion and I am going to overrule the motion. You may proceed with your defense, [286] gentlemen.

J. H. MORSE

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Angland:

Q. Will you state your name, please?

A. J. H. Morse.

Q. Where do you live, Mr. Morse?

A. Fort Benton.

Q. What is the nature of your work in Fort Benton?

A. Cashier of Chouteau County Bank, and Agent for the Fort Benton Insurance Agency.

(Testimony of J. H. Morse.)

Q. And as Agent for the Fort Benton Insurance Agency did you have occasion to write insurance for Noel Anderson, the plaintiff in this case, in the year '45?

A. Our records of that, show that insurance was written in '45.

Q. You have in response to a subpoena brought with you the records? A. Yes, sir.

Q. Will you produce the records you have of insurance issued in the year '45? Now I will hand you what has been identified as Defendant's proposed Exhibit No. 41, Mr. Morse, and ask you whether or not that is one of the records of your Fort Benton Insurance Agency?

A. It is. [287]

Q. And it is a record that has been kept by you, accurately kept? A. It is.

Mr. Lewis: We object to the introduction of this.

Mr. Angland: I haven't offered it, Mr. Lewis.

Mr. Angland: I will at this time offer in evidence Defendant's proposed Exhibit No. 41 as Defendant's Exhibit No. 41.

Mr. Lewis: The objection is that it goes to this—this is apparently a record of insurance policy on grain in storage in the name of Noel Anderson.

The Court: What is the basis of your objection?

Mr. Lewis: On October 1, '45. The objection is it is too indefinite. It does not in any way describe whether he had the grain, whether it had grain with reference to the partnership or not. The

(Testimony of J. H. Morse.)

evidence in this case is there was other grain in storage carried over from the old partnership, and there is nothing here to indicate what grain it is, the grain of Noel Anderson & Sons.

Mr. Angland: We will go along there may have been insurance on the A. E. Anderson partnership if counsel has some evidence to show that firm insured grain. This is to show Noel Anderson did have insured grain in '45.

The Court: That would be a matter of [288] rebuttal?

Mr. Angland: Yes.

The Court: I see no reason why it shouldn't be introduced.

Q. (By Mr. Angland): Now, Mr. Morse, did you issue grain insurance to A. E. Anderson & Sons in the year '45?

A. Our records don't show that.

Q. Did you issue any grain insurance to Noel Anderson & Sons in the year '45?

A. Our records don't show that.

Q. Do your records show that you did in a subsequent year issue insurance to Noel Anderson & Sons? A. Yes.

Q. And when was that? You are going through quite a few sheets; maybe I had better break that down. Will you state whether or not in the year '46 you issued grain insurance to Noel Anderson & Sons? A. No.

Q. Did you issue grain insurance policy to Noel Anderson in the year '46?

(Testimony of J. H. Morse.)

A. According to our records it was issued in the name of Noel Anderson.

Q. It was issued in the name of Noel Anderson? A. Yes.

Q. And in the year '47 what do your records show as to the issuance of grain insurance?

A. The same as '46. [289]

Q. The same as in '46? A. Yes.

Q. It was issued to Noel Anderson?

A. Yes.

Q. And what aout the year '48, did you issue grain insurance that year?

A. The same as the previous years.

Q. To Noel Anderson? A. Yes.

Q. According to the policy, is that right?

A. Yes.

Q. And in '49 what do your records show with reference to the issuance of grain insurance?

A. It was issued to Noel Anderson & Sons.

Q. Now, Mr. Morse, as cashier of the Chouteau County Bank and in response to a subpoena you have brought with you the records of the Chouteau County Bank, have you? A. I have.

Q. Defendant's Exhibit No. 41 shows a premium due of $112.50 for the insurance of 15,000 bushels of grain in storage. Do you find in the bank accounts of the Anderson family, one of the accounts—they have been stipulated here by stipulation—do they show that a check for payment of an amount of $112.50 was made on or about November 1st, '45,

(Testimony of J. H. Morse.)

the date on which this item appears to have been paid? It is marked [290] as of that date on Defendant's Exhibit 41.

Mr. Lewis: We object on the ground that he hasn't sufficiently identified it either with this exhibit or with the plaintiff in the case.

Mr. Angland: Well I can get at it in another way, your honor. I will withdraw the question.

Q. In the year '45, Mr. Morse, was there an account carried in the Chouteau County Bank in the name of Noel Anderson & Sons?

A. In '45?

Q. Yes. A. No, there wasn't.

Q. Was there an account in the Chouteau County Bank in the name of A. E. Anderson & Sons?

A. There was.

Q. Now will you look please at that record, that bank record for the year '45 and state whether or not you find that a check was issued on or about November 1st, '45, for the sum of $112.50?

A. There was no charge on A. E. Anderson & Son for amount of $112.50.

Q. The A. E. Anderson & Son account does not appear to have been charged for an item in that amount? A. No. [291]

Q. Would you carry on? Did you have an account in the name of Noel Anderson in '45?

A. Just Noel Anderson, no.

Q. Did you have an account, a joint account in the name of Noel Anderson and Agnes Anderson in the year '45? A. Yes, for '45.

(Testimony of J. H. Morse.)

Q. Now will you look please at that record and state whether or not on or about November 1st, '45, the date upon which Defendant's Exhibit No. 41 appears to have been paid you find that account charged with an item in the amount of $112.50?

Mr. Lewis: We object, if the court please, on the ground that the check itself would be the best evidence. There may, to illustrate what I mean by that, there may have been a check written to somebody else for that amount. It isn't identified at all in payment of this.

Mr. Angland: Will you produce the check then, Mr. Lewis?

Mr. Lewis: I haven't any here.

Mr. Angland: You don't have it here?

Mr. Lewis: No.

Mr. Angland: You don't know whether or not it is available? [292]

Mr. Lewis: No, I don't. I haven't the slightest idea.

Mr. Angland: Well this is the bank record we submit, your honor, and it certainly tends to prove——

The Court: Well perhaps the plaintiff—inquire of the plaintiff whether the plaintiff can produce it, whether or not be knows where it is.

Mr. Lewis: I don't think he can because I am sure we have no bank records.

The Court: Have you inquired right now on this matter under consideration?

(Testimony of J. H. Morse.)

Mr. Lewis: He says he has none here but he has at home.

Mr. Angland: I don't like to unduly delay the matter but I guess we will have to if the court sees fit.

The Court: I will overrule the objection and admit this testimony in reference to the check if you can supplement it and identify it so you know exactly what it refers to. The way it stands now it does appear to be rather indefinite. There might have been——

Mr. Angland: I think our position on that would be this, your Honor; the account, the exhibit shows a charge to the assured, Noel Anderson; the charge at the bank to the Noel Anderson and Agnes Anderson account is in a like amount; it certainly tends to prove—— [293]

Q. (By Mr. Angland): Isn't that the situation, Mr. Morse? A. Yes, sir.

Q. Could you find that check? A. Yes.

Q. What date?

A. There is a charge on November 1st, '45 for $112.50.

Mr. Angland: Now, your Honor, this exhibit appears to have been paid on that very date.

The Court: Very well, I will take your word for it. That appears to identify it to that extent any way. It may stand.

Mr. Angland: It is consistent. In order to have the proof clearly considered, your Honor, as I say I don't like to delay this matter and ask for a recess

(Testimony of J. H. Morse.)

but I do feel the plaintiff should produce that check as he states he does have it, if Mr. Lewis wishes to take further evidence next week sometime when that check may be produced.

Mr. Lewis: Of course, I don't know enough about it at this time.

The Court: Well we will let the record stand as it is now and see what you can make out of it when the situation is discussed by both sides. Go ahead.

Mr. Angland: You may cross-examine. [294]

J. H. MORSE

Cross-Examination

By Mr. Lewis:

Q. Mr. Morse, will you state what this insurance is regarding insurance policies as to names that they were written in or whether at times you may write policies for a firm in the name of one individual or write insurance on property in the name of one individual?

The Court: That is rather an involved question. I think you better make it a little more definite and short.

Mr. Lewis: Very well. Strike the question.

Q. Mr. Morse, will you state whether or not you often write insurance on grain, for instance, in the name of one individual when it might be grain for a partnership or a corporation?

Mr. Angland: Well, now, just a minute. To

(Testimony of J. H. Morse.)

which I will object, your honor; the question in issue is what was done in this case, not what the insurance was.

The Court: I will sustain the objection.

Q. Mr. Morse, do you pay very much attention in general to particular names in insurance policies?

Mr. Angland: That is objected to, your Honor, as improper cross-examination.

The Court: Yes.

Mr. Lewis: That is all. [295]

L. G. WRIGHT

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Angland:

Q. Will you state your name, please?

A. L. G. Wright.

Q. Where do you live, Mr. Wright?

A. Fort Benton.

Q. And what official position, if any, do you have at Fort Benton, Montana?

A. Chouteau County Treasurer.

Q. Mr. Wright, as Chouteau County Treasurer you have custody of the Chouteau County records showing payment of taxes to Chouteau County?

A. I do.

Q. And in response to a subpoena have you examined your records with reference to the assess-

(Testimony of L. G. Wright.)

ments made on Noel Anderson, Noel Anderson & Sons, and A. E. Anderson and Sons for the year '45? A. I have.

Q. What do your records show with reference to the assessment of real estate in the year '45?

A. For the real estate—you don't want the description? [296]

Q. No, it isn't necessary I don't think. I think we can dispense with that.

A. Consisting of 5,793 acres was assessed in the name Andrew E. Anderson in '45.

Q. Andrew E. Anderson in '45? A. Yes.

Q. Did you find a record of any real estate assessed to Noel Anderson and Sons in the year '45?

A. There was no real estate assessed to that partnership in '45.

Q. Was there any personal property assessed to Noel Anderson & Sons in the year '45?

A. No.

Q. Was there any personal property assessed to Noel Anderson in '45? A. No.

Q. Now with reference to the year '46 was there assessment of real estate to Noel Anderson & Sons?

A. No.

Q. Was there an assessment of personal property to Noel Anderson & Sons? A. No.

Q. Was there an asssessment of personal property to Noel Anderson? A. No.

Q. What name was the personal property assessed in? A. A. E. Anderson & Son. [297]

Q. And that is for the year '46? A. '46.

(Testimony of L. G. Wright.)

Q. I don't believe I asked you the nature of the assessment in the year '45 on personal property, to whom was that assessed?

A. That was assessed to A. E. Anderson & Son in '45.

Q. And you have no record of the assessment of personal property or real property to either Noel Anderson or Noel Anderson & Sons in either years '45 or '46?

A. There was certain real estate, a town lot assessed to, no, that is right in '45; there wasn't on '46.

Q. In '45 there was no assessment to either Noel Anderson or Noel Anderson & Sons either on realty or personal property? A. In '46?

Q. In '45? A. No.

Q. In '46 what is the situation, Mr. Wright?

A. Well, the personal property assessed to Noel Anderson & Son in '46.

Q. And the other real estate you state was also assessed to A. E. Anderson?

A. Andrew E. Anderson. [298]

Q. Andrew E. You referred I believe to a city lot there was an assessment on, and was that the year '46?

A. No, there wasn't anything in '46.

Q. So your records show nothing in '46 by way of assessment to either Noel Anderson or Noel Anderson & Sons? A. No.

Mr. Angland: You may cross-examine.

L. G. WRIGHT

Cross-Examination

By Mr. Lewis:

Q. Mr. Wright, are the two assessments there which you referred to as the land and personal property separate assessments?

A. Yes, they are.

Q. Will you state, Mr. Wright, what the policy is or basis is the person to whom the property is assessed?

Mr. Angland: Just a minute, your Honor. Policy again, we would object to any testimony as to policy.

The Court: Sustain the objection.

Q. If you know, when the assessor makes the assessment of the real estate do you know whether or not it is made in the name of the record title holder of the property? [299] A. Yes.

Mr. Lewis: That is all.

CARLEY MORGER

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bowen:

Q. Will you state your name, madame?

A. Carley Morger.

Q. Where do you live?

A. In Fort Benton.

Q. Are you employed in Fort Benton?

A. Yes, I am.

(Testimony of Carley Morger.)

Q. What is the nature of your job there?

A. I am Secretary of the Chouteau P. & A. office.

Q. As Secretary of the Triple A office, is it?

A. It is now called P. & A. office.

Q. It was called the Triple A office?

A. Correct.

Q. As Secretary of the P. & A. office, Mrs. Morger, are you the custodian of the records?

A. I am.

Q. You are here today in response to a subpoena by the defendant, are you not?

A. That is correct. [300]

Q. And you were directed to bring all records of the Anderson family relative to the year '45 in regard to farm conservation program work, isn't that correct? A. That is correct.

Q. Do you have those records with you?

A. I have.

Q. Will you turn, Mrs. Morger, to your records of the Anderson family firm operation in '45 relative to their participation in the '45 agricultural conservation program? Do you have such a record?

A. I have the record, yes.

Q. In whose name is that record carried as the operator? A. A. E. Anderson & Son.

Q. A. E. Anderson & Son? A. Yes.

Q. And what does that record purport to be?

A. It is the '45 agricultural conservation pro-

(Testimony of Carley Morger.)

gram farm plan what their intended practices under this program would be for '45.

Q. And who signs in the name of the operator there?

A. It is signed A. E. Anderson & Son by Noel Anderson.

Q. And dated? A. March 19th, '45. [301]

Mr. Bowen: We offer in evidence Defendant's Exhibit 42.

Mr. Lewis: No objection.

The Court: It may be received in evidence.

Q. (By Mr. Bowen): Mrs. Morger, turning next to any Anderson family farm operations for '45, do you have any record of an Anderson family farm participation in the grazing and land management plan? A. I have.

Q. And in whose name?

A. A. E. Anderson, c/o Noel Anderson.

Q. C/o Noel Anderson? A. Yes.

Q. And what does that grazing plan comprise?

A. It comprises the feed resources and inventory of that, inventory of the livestock, and also the practices, intent of practices for '45.

Q. And in whose name as operator is that plan signed?

A. A. E. Anderson & Son by Noel Anderson.

Q. And dated?

A. 5th Month, 31st day, '45.

Q. Now attached to that plan is a card statement, a postal card, Mrs. Morger?

(Testimony of Carley Morger.)

A. That is correct. [302]

Q. And what does that postal card purport to be?

A. It is a card sent to the Chouteau County A.A.A. office by Noel Anderson, and it says that he intended to perform a practice and he had kept it. It was a stock water dam.

Q. And that is signed by whom?

A. A. E. Anderson & Son by Noel Anderson.

Mr. Bowen: I offer Defendant's Exhibit 43 and 44 in evidence, your honor.

Mr. Lewis: No objection.

The Court: Very well, it may be received in evidence.

Mr. Bowen: To clarify the record, I don't believe I stated that we offered Defendant's Exhibit 42 in evidence. It was admitted without such an offer.

The Court: Very well. No objection?

Mr. Lewis: No objection. That was the one before these?

Mr. Bowen: Yes.

The Court: It may be received in evidence.

Q. (By Mr. Bowen): Now turning again to the year '45, Mrs. Morger, do you have any record of participation by the Anderson family firm in an agricultural conservation plan farm and ranch details activity? A. I have. [303]

Q. Do you have that record with you?

A. I have.

Q. In whose name is that record listed as operator?

(Testimony of Carley Morger.)

Mr. Lewis: Just a minute. If the court please, may we have the year first so we can keep track of it?

Mr. Bowen: I just stated the year '45.

A. Noel Anderson.

Q. Noel Anderson? A. That is correct.

Q. And what does that purport to be?

A. It is a profile. It is a profile of the damsite. It says it is a new water dam, a stock water dam, and it gives the location where it was to be built.

Q. And it is approved in the year '45?

A. That is correct.

Q. By whom, please, ma'm?

A. Ray Fisgbaugh, who was Chairman of the Chouteau A.C.A. at that time.

Q. And the date it was approved?

A. July 4th, '45.

Mr. Bowen: That is all.

Mr. Lewis: If the court please, may I inquire of the witness? [304]

Cross-Examination

By Mr. Lewis:

Q. Mrs. Morger, do you know whether or not A. E. Anderson & Sons had been under the Triple A program or A. & P. program for some time before the year '45?

A. I do not know. I could not tell you.

Q. You don't have that record? If A. E. Anderson & Son had been under the program in any branch you know about in your office and Mr. Noel

(Testimony of Carley Morger.)

Anderson or anyone else hadn't come to the office in the latter part of '44 when you were planning this program or the early part of '45, would you have carried it on in the same name?

Mr. Bowen: Objection, your Honor. His statement is if something had been done in '44. This young lady has a subpoena; it is a subpoena directed to the year '45, and being in the nature of a highly technical question its relevancy is objected to for purposes of clarifying any misunderstanding here. It appears from that exhibit on the face of it that the new dam had been built and was approved in '45 and you might assume from that they brought out in their testimony it was begun in '44. We could agree that was the year.

Mr. Lewis: That it was begun in '44?

Mr. Bowen: Planning stage in '44.

Mr. Lewis: Will you agree this was in the [305] planning stage in '44?

Mr. Bowen: Yes.

Mr. Lewis: No objection.

The Court: It may be received in evidence when it is offered.

Mr. Bowen: We offer Defendant's Exhibit No. 45 in evidence.

Redirect Examination

By Mr. Bowen:

Q. Now that it appears, Mrs. Morger, that the Anderson family was participating in a conservation program in the year '45, do you have a record

(Testimony of Carley Morger.)

of payment of Government subsidies in the year '45 too for their participation in the conservation program? A. I have.

Q. And in whose name is that particular record?

A. A. E. Anderson & Son.

Q. And subscribed to as operated by whom?

A. By Noel Anderson & partners.

Q. By Noel Anderson and the date of that record? A. 4/9/46. [306]

Q. So that payment for and participation in '45 was made in '46, is that right?

A. That is correct.

Q. And to the operator Noel Anderson?

A. That is correct.

Mr. Lewis: May I inquire?

Recross-Examination

By Mr. Lewis:

Q. Mrs. Morger, when this is made up and sent out to Mr. Anderson, for instance, is the name of A. E. Anderson & Son typed in here on this, is it Defendant's Exhibit No. 46, on this exhibit part of which before it goes out? A. That is correct.

Q. And was it, Mrs. Morger, on Exhibit 46? In other words, it goes to the producer or whoever he may be only to sign?

A. Unless he should come in the office and tell us how it is to be typed on it.

Mr. Bowen: We offer Defendant's Exhibit 46 in evidence, your Honor.

Mr. Lewis: No objection.

(Testimony of Carley Morger.)

The Court: It may be received in evidence. [307]

Redirect Examination

By Mr. Bowen:

Q. Turning next, Mrs. Morger, those subsidy payments to the Anderson family in '46, do you have any record? A. I have.

Q. And the name of the operator appears on that record as whom?

A. A. E. Anderson & Son.

Q. And subscribed to by whom?

A. Noel Anderson.

Q. A. E. Anderson & Son and subscribed to by Noel Anderson? A. Yes.

Q. And the date? A. 3/27/46.

Mr. Bowen: We offer in evidence Defendant's Exhibit No. 47.

Mr. Lewis: No objection.

The Court: It may be received in evidence.

Q. (By Mr. Bowen): Finally, Mrs. Morger, as you have stated the subpoena directed you to bring all records relative to operations of the Anderson family firm for the year '46 and '46, is that correct?

A. Yes. [308]

Q. Did the subpoena direct you to do that?

A. Yes, sir.

Q. In your search of the records did you find any records relative to the Noel Anderson & Son partnership for the year '45 or '46?

A. I did not.

Mr. Bowen: No further questions.

(Testimony of Carley Morger.)

Recross-Examination

Q. Mrs. Morger, directing your attention to Defendant's Exhibit 44, which is the grazing land management plan, will you state what time of the year you started your work in the office in drawing up papers like this?

A. Chouteau County does not have a program such as this any more and I am not familiar with when they would have done this type of work.

Q. You are not familiar with that?

A. No, I am not.

Q. Normally when does the A.C.A. or the plans whatever they are in the office, normally when do they start with the papers? [309]

Mr. Angland: That is objected to again, your Honor, normally what they did this witness does not know what was done in '45 and states that.

Mr. Lewis: I will change the question if the court please.

Q. When did you start to work?

A. In May '50.

Q. May, '50? A. I believe that is right.

Q. Do you know? A. It was May, '51.

Q. Do you know, Mrs. Morger, what plans were in the office since you started to work there?

Mr. Angland: Just a minute.

The Court: What is that?

Q. What plans were in operation under the P. & A. program since you started to work there?

(Testimony of Carley Morger.)

Mr. Angland: I will object to that, your Honor, in that it has nothing to do with it, it is irrelevant and has to do with matters that have been handled since May of '51. Is that when you went to work?

A. Yes.

Mr. Angland: It is remote and wouldn't tend to prove or disprove any issue in the case.

The Court: I think so.

Mr. Lewis: All right, I think we can get at [310] it in another way.

Mr. Lewis: No further examination.

SAM CHAPMAN

was called as a witness for defendant, and having been first duly sworn, testified as follows:

Direct Examination

By Mr. Bowen:

Q. Will you state your name, please?

A. Sam Chapman.

Q. Where do you live? A. Great Falls.

Q. Are you employed here in Great Falls?

A. I am.

Q. What is your business?

A. Office Manager, Greely Elevator Company.

Q. As Office Manager of the Greely Elevator Company are you the custodian of the company records? A. I am.

Q. You are here in response to a subpoena from the department to produce records for the year '45, are you not? A. I am.

(Testimony of Sam Chapman.)

Q. And that subpoena directed you to bring all records, did it not, of A. E. Anderson & Son, Noel Anderson, and all you have on Noel Anderson & Sons, is that correct?

A. That is correct. [311]

Q. And you were particularly directed to bring records of your stations, of your three stations in the Fort Benton area, isn't that correct?

A. That is correct.

Q. What are those three stations?

A. Loma, Fort Benton and Highwood.

Q. Those are the, having heard the testimony of these witnesses relative to the location of the Anderson family farm, can you conclude that these three stations serve the area of their farm? By that I mean are they in close proximity?

A. I doubt that Highwood would.

Q. You doubt that Highwood would be but Loma and Fort Benton would be related stations?

A. Right.

Q. Have you made a close check and inquiry of all your records so for the year '45 relative to operations and purchases and dealings with the Anderson family farm? A. I have.

Q. Have you summarized for purpose of recollection such dealings? A. I have.

Q. Do you have that summary with you?

A. I have a copy of the summary. [312]

Q. May I exchange and give you the original and I will take the copy. Turning to your first

(Testimony of Sam Chapman.)

entry in this summary, Mr. Chapman, what is the date of that entry please, sir?

A. January 10th, '45.

Q. And which records what transaction?

A. Sale of wheat.

Q. Sale to you of wheat, is that correct?

A. Yes, money paid to Mr. Anderson.

Q. And does this summary record the amount of that wheat?

Mr. Lewis: Just a minute. Do I understand it is for January?

Mr. Bowen: Yes.

Mr. Lewis: We object as not having anything to do with this case; that it couldn't be the '45 crop.

Mr. Angland: It doesn't have to be the crop, your Honor. It is property owned by the partnership, not what was the business they took over. That is what I understand of plaintiff's case attempting to explain to the court Noel Anderson & Sons took over from the A. E. Anderson & Son, so it doesn't make any particular difference. There isn't any question when the property was grown, it is disposition of the property.

Mr. Lewis: The evidence is clear that the '44 crop was the property of A. E. Anderson & Son; that is very clear from the evidence; there is nothing to dispute it. [313]

Mr. Bowen: It is also clear this taxpayer was a cash basis taxpayer in the year '45, and as a cash basis taxpayer he is accountable for income earned

(Testimony of Sam Chapman.)

and reported in that year, and not income earned on an accrual basis accounting.

Mr. Lewis: But it was reported in the A. E. Anderson return and not in the other one.

Mr. Bowen: For what it is worth, your Honor, I would like to continue this questioning.

The Court: For what?

Mr. Bowen: For whatever it may be worth as proof I would like to continue the questioning after this discussion, for any purpose that it may serve.

The Court: Well you are objecting to the question?

Mr. Lewis: That part of it. That item clearly on the face of it wouldn't go in.

The Court: Well that is a matter of argument. It may be material. We will see what he says about it. I will overrule the objection and it may go in.

Q. (By Mr. Bowen): And the amount of the check that was issued to Mr. Noel Anderson?

A. $6,024.24.

Q. Then turning to your next entry, what is the date of that entry? A. April 15th, '45. [314]

Q. And the check that is issued——

Mr. Lewis: Just a minute. May I get my objection in, if the court please. We object to that item on the same grounds.

The Court: Overrule the objection.

Q. The check is issued on that date to what drawee, payee? A. Noel Anderson.

Q. And it was for what commodity?

A. Barley.

(Testimony of Sam Chapman.)

Q. And the amount? A. $11.24.

Q. Now turning to your next entry, what is the date of that entry? A. August 13th, '45.

Q. And that was for the purchase of what commodity? A. Wheat.

Q. The check was issued to whom?

A. Mr. Lewis: What type of wheat?

Q. He wants to know what type wheat that was?

A. Winter wheat.

Q. And the check was issued to whom?

A. A. E. Anderson & Son.

Q. And the amount of that check?

A. $5,174.19. [315]

Q. Now turning to the next entry re check issued to A. E. Anderson & Son, what is the date?

A. August 20, '45.

Q. And for what commodity?

A. Winter wheat.

Q. In the amount? A. $1,441.45.

Q. And the amount of that check was? You have given then the cash and amount of wheat.

A. The amount of wheat 1,135 bushels.

Q. Turning next entry, what is the date of that entry? A. September 5th, '45.

Q. And there was further purchase of what commodity? A. It was a protein payment.

Q. Protein payment? A. Yes.

Q. To whom? A. A. E. Anderson & Son.

Q. In the amount in cash? A. $561.54.

Q. And the next entry, Mr. Chapman?

(Testimony of Sam Chapman.)

A. September 21st, '45, protein payment, A. E. Anderson & Son.

Q. Check made to A. E. Anderson & Son?

A. Right, in the amount of $17.45. [316]

Q. Let's continue down in this summary to the next item recorded there in '45; what is the date of that item? A. August 17th, '45.

Q. Commodity purchased? A. Barley.

Q. A check issued to whom?

A. A. E. Anderson & Son.

Q. And the amount of that check?

A. $133.79.

Q. And another entry on the same date, I believe, is that correct? A. That is right.

Q. For the same commodity? A. Barley.

Q. To the same payee? A. It is.

Q. And the second entry payment was in what amount? A. $187.51.

Q. Then I take it from your summary, Mr. Chapman, that there were no transactions in the name of Noel Anderson & Sons in '45, is that correct, Noel Anderson & Sons?

A. That is correct. [317]

Q. Continuing, Mr. Chapman, to the year '46, what is your earliest entry for that year? May 18th? A. May 17th.

Q. '46 and the purchase of what commodity and what amount?

A. That was redemption of Commodity Credit Loan.

Q. And for what amount of wheat?

(Testimony of Sam Chapman.)

A. 1,723 bushels of winter heat.

Q. And the payee in that case was whom?

A. Commodity Credit.

Q. For whom?

A. For Noel Anderson wheat.

Q. And the amount of that check?

A. $2,778.98.

Q. There was another entry that same date, I believe, wasn't there? A. Right.

Q. Being May 17th, '46? A. Right.

Q. And the nature of that entry?

A. That was also a check issued to Commodity Credit Corporation for 1,686 bushels of winter wheat.

Q. And for the benefit of whom?

A. It was identified as Noel Anderson wheat.

Q. In the amount? A. $2,668.72. [318]

Q. Now continuing down this next entry in '46, that would be the third item from the bottom. What is the next entry? A. October 3rd, '46.

Q. And that was recorded purchase of what commodity? A. Winter wheat.

Q. Winter wheat and the check was issued to whom? A. Noel Anderson.

Q. And the amount of that check?

A. $197.64.

Q. Continuing on down to the next item when is your first recordation of a transaction with Noel Anderson & Sons, if any, partners?

A. October 1st, '46.

Q. And what was the nature of that transaction?

(Testimony of Sam Chapman.)

A. Purchase of winter wheat.

Q. In what amount? A. 415 bushels.

Q. And the check was issued to whom?

A. Noel Anderson & Sons.

Q. Will you check and see; does that indicate who endorsed the check?

A. Signed endorsement Noel Anderson & Sons by Noel Anderson. [319]

Q. And the amount of that check?

A. $728.90.

Q. Did your record and inquiry show any other purchase in the year '47 from the partnership of Noel Anderson & Sons? A. It did.

Q. In '46 now I am referring you to.

A. You said '47.

Q. In the year '46? A. No.

Q. No other purchase? A. No.

Q. I hand you Plaintiff's Exhibits 25 and 26, Mr. Chapman, and ask you to summarize, familiarize yourself with them just a minute. What do those two exhibits purport to represent to your knowledge?

A. Well the sale of wheat. Contract of sale of wheat.

Q. Can you tell by inquiring into what appears there who stored the wheat with you?

A. Noel Anderson & Sons.

Q. Where did you get that, Mr. Chapman?

A. Oh, wait a minute.

Q. That shows approval on behalf of Commodity Credit Corporation?

(Testimony of Sam Chapman.)

A. Stored for Commodity Credit. [320]

Q. It was stored for Commodity Credit?

A. Right, in our elevator.

Q. To refresh your recollection and to aid in your inquiry, if you would turn for a minute to your summary, Mr. Chapman, of dealings on May 17th, '46 we covered just now that there was a transaction with Commodity Credit Corporation for Noel Anderson, isn't that correct?

A. That is correct.

Q. Then would it appear from that that the grain when brought in was brought in by Noel Anderson?

Mr. Lewis: That is objected to as calling for a conclusion of the witness; he can only testify from his records.

Mr. Bowen: I am asking him to look at his records and see if he did.

A. The check was issued to Commodity Credit Corporation, or the checks I should say.

Q. Right.

A. For the redemption of a loan on Anderson wheat. Our elevator agent designated this as Anderson wheat for office purposes; as to whether it was Noel Anderson & Son or Noel Anderson I wouldn't say.

Q. You couldn't tell from that record?

A. It was Anderson wheat. In other words, Anderson did not receive that money from us. [321]

Q. It went direct to Commodity Credit?

A. Yes.

(Testimony of Sam Chapman.)

Q. Do your records show a payment other than to Commodity Credit?

A. No; it shows on the duplicate only.

Q. Now I refer you to that duplicate, Mr. Chapman, and do I understand you correctly that this entry indicates nothing to you?

A. Which entry is that?

Q. That entry right here "bought of"?

A. Only that it was Anderson wheat.

Q. Well what does that entry read?

A. Noel Anderson.

Q. It was bought of Noel Anderson according to your entry there? A. That is right.

Q. The exhibits that you have there, may I see one of them. Plaintiff's Exhibit 25 refers to receipt at the warehouse of 1,723 bushels of wheat; this Defendant's Exhibit 49, what does it show as to amount of wheat? A. 1,723 bushels.

Q. And the date of that exhibit?

A. May 17, '46. [322]

Q. May 17, '46. Can you with your knowledge of the operation of storage and payment for grain identify the storage and payment for the wheat by you, payment being made to Commodity Credit with this contract?

Mr. Lewis: Just a minute. If the court please, I wonder if we couldn't have both exhibits go into the record; that is very important. I think the number of the exhibits should be given.

Mr. Bowen: We have here Defendant's Exhibit 39 and Plaintiff's Exhibit 25.

(Testimony of Sam Chapman.)

A. I can identify these two as the same.

Q. I didn't get your answer.

A. I can identify these two as the same.

Q. Recording the same entry and referring now to Defendant's Exhibit 48 and Plaintiff's Exhibit 26, can you make the same identification?

A. I can.

Q. That is the same wheat then the record here? A. That is the same wheat.

Q. In other words, the same wheat?

A. Yes.

Mr. Bowen: I offer Defendant's Exhibits 48 and 49 in evidence, your Honor.

Mr. Lewis: There is no objection.

The Court: They may be received. [323]

Q. (By Mr. Bowen): Referring again to these exhibits and to your summary, Mr. Chapman, can you tell when and in whose name you received the wheat referred to at your elevator the wheat referred to in Plaintiff's Exhibit 25 and Plaintiff's Exhibit 26; can you tell us when you received that wheat and from whom? Also referring to your summary of dealings with Commodity Credit Corporation on or near that date? In other words, it is clear that the wheat had to be brought in by some producer, isn't that right? A. That is right.

Q. And have to be stored with you in the name of some producer before a loan could be procured from Commodity Credit Corporation, isn't that correct? A. That is correct.

(Testimony of Sam Chapman.)

Q. Can you tell from either of those two exhibits, Plaintiff's Exhibits 25 and 26 and Defendants's Exhibits 48 and 49 from whom you first got the wheat and stored it?

A. Noel Anderson.

Q. Noel Anderson.

Mr. Bowen: No further questions. [324]

Cross-Examination

By Mr. Lewis:

Q. Mr. Chapman, of course, in your testimony here you are testifying only from the records that you have there, is that right? A. That is all.

Q. And you wouldn't presume to say that because the name of Noel Anderson was on there that it was not part of the family wheat or family partnership wheat of A. E. Anderson & Sons, say?

Mr. Angland: Just a minute. Your Honor, he is presuming to say something. The exhibits have been admitted in evidence; they speak for themselves.

The Court: Yes. Sustain the objection.

Q. Will you refer, Mr. Chapman, to something you said about redemption certificates when you were being questioned. I don't know what it is. I want you to explain it to me. You used the term redemption certificate.

A. A loan was taken out on this wheat.

Q. Which wheat will you please tell me now?

A. On the two transactions of May 17th, '46 for Commodity Credit Corporation. As I understand it

(Testimony of Sam Chapman.)

a farmer may elect to take a loan through the Commodity Credit Corporation on wheat and in order for this wheat to be released to us the Commodity Credit Corporation loan has to be satisfied; for that reason [325] the checks were issued to the Commodity Credit Corporation.

Q. Now, Mr. Chapman, are you familiar with the bonus program for that particular time?

A. I am not.

Q. Well, I will ask you to refer to Plaintiff's Exhibits 25 and 26 and look at the bottom of the two exhibits and state whether or not that does not have to do with the bonus program that was on at that time and not a loan program?

Mr. Angland: We will object to that as being improper cross-examination. The witness has stated that he was not familiar with the bonus program in '45. If the exhibits show something, then the exhibits speak for themselves.

The Court: Yes, I think so.

Mr. Lewis: I don't want to argue with the Court. He has stated definitely there was a loan.

The Court: Well it will have to stand. If you have some rebuttal testimony to show it wasn't, if you think it is important, you can do that.

Q. You said you were not familiar with the bonus program so you don't know what that was?

A. It was a loan; it was a redemption of a loan and that is all I know.

Q. That is what you think these are?

A. Yes.

(Testimony of Sam Chapman.)

Mr. Lewis: That is all. [326]

Mr. Bowen: No further questions.

The Court: We will take a recess. (11:15 a.m.)

(Court resumed, pursuant to recess, at 11:30 o'clock a.m., at which time all counsel and parties were present.

The Court: Call your next witness.

Mr. Bowen: That closes our case, your Honor.

The Court: Rebuttal?

Mr. Lewis: Yes, a little, if the court please. Mr. Anderson.

The Court: Proceed.

NOEL ANDERSON

plaintiff, resumed the stand and testified as follows:

Direct Examination
(Rebuttal)

By Mr. Lewis:

Q. Mr. Anderson, you heard the testimony of Mr. Chapman, with reference to grain sales, and also testimony of Mrs. Morger with reference to the P.M.A. practices? A. I did.

Q. You are familiar with what was testified to by each of these witnesses?

A. I am, thoroughly. [327]

Q. Will you please state whether or not these practices and this testimony related to the period that you call the transition period?

A. It does.

(Testimony of Noel Anderson.)

Q. From the old partnership to the new?

A. That is correct.

Q. I direct your attention, Mr. Anderson, to Plaintiff's Exhibits 25 and 26 and Defendant's Exhibits 48 and 49, and remind you of the statement of Mr. Chapman as to all four exhibits have to do with a loan, will you state whether or not there was a loan at that time with Commodity Credit Corporation by you either as A. E. Anderson & Sons or Noel Anderson and Sons?

A. There was no loan of any kind carried with this wheat.

Q. Now will you explain to the court what that transaction was? It is rather complicated and I would like to have you tell what happened there in as few words as possible.

A. If I remember correctly, in the spring of '46 there was a demand for wheat. I believe it was for export purposes. The Government through the Commodity Credit Comparation made an appeal to farmers who had farm-stored wheat to deliver their wheat at this time and in turn they would be paid a bonus. If I remember correctly, this bonus was to be 30c per bushel in addition to the market price of the wheat at the time [328] the farmer elected to determine the market price on that wheat.

Q. What did you do with reference to that wheat? Tell the court what happened? Where was the wheat? What did you do with reference to it?

A. Noel Anderson & Sons had considerable wheat stored on the farm.

(Testimony of Noel Anderson.)

Q. From what crop?

A. From the '45 crop. And in accordance with this demand this wheat was hauled to the elevator in May of '46.

Q. And that would be the Greely Elevator in this instance?

A. There are two contracts here with the Greely Elevator Company and one with General Mills, Inc.

Q. Now when you deliver the wheat how is it after you deliver the wheat, did you sign Plaintiff's Exhibits 25 and 26?

A. Exhibit No. 25 was signed on May 23rd, '46, and Exhibit 26 was signed on May 23rd, '46.

Q. Now was there any loan then connected with any of these exhibits?

A. There was no loan connected with this wheat.

Q. All that was then as you explained a bonus proposition? A. Correct. [329]

Q. And carried over a period of several months?

A. That is correct.

Q. Mr. Anderson, I direct you particularly to Defendant's Exhibit 42 and to the first line; what is the first line of the description?

A. The first line designates "practice D 5, field strip cropping."

Q. Mr. Anderson, will you tell the court what that practice is and whether it touches over more than one year, and, if so, which years would be involved in that item?

A. In the practice of field strip cropping as far

(Testimony of Noel Anderson.)

as the farming is concerned alternate strips of crop or of land, cultivated land are cropped each year. I mean by that that in one year you will have that certain strip in crop and the next year it will be summer fallow.

Q. Now can you state whether or not that particular item would refer to '44 and '45 both?

A. As far as the field strip cropping is concerned it would.

Q. And if something occurred in '44, it would have something to do with the A. E. Anderson & Son—— A. It certainly would.

Q. Records? A. It certainly would. [330]

Q. Now directing your attention to the second line denoted "reservoir," I will ask you whether the item "reservoir" on Defendant's Exhibit 42 and Defendant's Exhibit 43 and Defendant's Exhibit 44 have reference to the same practice of P.M.A., or whatever we call it—they change their numbers so often—conservation practice this would be?

A. Yes, they have reference to the same practice.

Q. Now what occurs when you do this sort of work; are any payments received by the person who does this conservation work?

A. Yes, we receive payments for that work.

Q. And you do it under two offices really part of the conservation office?

A. The application is made through the P.M.A. office and the technical work you might say is done through the Soil Conservation office.

(Testimony of Noel Anderson.)

Q. And Deefndant's Exhibit 45 would be the Soil Conservation Offices as part?

A. That is correct.

Q. And the other two would be the A.C.A. Office at that time, now P.M.A.? A. That is correct.

Q. Now when you had any occasion to enter in the books of your records any payments, state what you did with reference to segregation, if any, between the reservoir, for instance, and stripping and so forth, [331] whether there was segregation between the two accounts on your books? I mean by two accounts between A. E. Anderson & Son and Noel Anderson & Sons?

Mr. Angland: Objected to, your Honor. Those books are in evidence and speak for themselves on that point.

The Court: Have you got a record of that?

Mr. Lewis: I don't think we can go into that in detail and I don't think it is important enough.

The Court: Ask him if he segregated the account?

Q. (By Mr. Lewis): Did you segregate it in this transition period before you made your income tax returns whatever belonged to A. E. Anderson and whatever belonged to Noel Anderson & Sons?

A. The practices that were performed in '45 were done under the Noel Anderson & Sons partnership and the payment for the same was entered as payments to——

Q. If it was payable out for construction of the

(Testimony of Noel Anderson.)

dam, it would be an expense that you would enter?

A. That is correct.

Q. And if it was a receipt from the Government for part of the refund, that would be entered as a receipt, would it? A. Yes.

Q. And it was? A. It was. [332]

Q. Now just referring to Defendant's Exhibit 47, Defendant's Exhibit 44 and Defendant's Exhibit 46, with the exhibits we have previously referred to, Defendant's Exhibits 42, 43 and 45, will you please state whether or not during the time that you signed any of those exhibits that you did sign whether or not you were doing business still under the name officially of A. E. Anderson & Sons?

A. That is correct.

Q. Now they are all then before May 1st, '46?

A. That is correct.

Q. At which time you testified the Noel Anderson account was opened in the bank?

A. That is right.

Q. And the exhibits which bear the name, the signature of Noel Anderson and Sons, Defendant's Exhibits 25 and 26, were signed Noel Anderson & Sons, were they? A. Yes.

Q. And on the date stated therein?

A. That is correct.

Q. May 23rd, '46? A. '46.

Q. After you had established the new bank account and were getting the matters changed over into the new partnership?

A. That is correct. [333]

(Testimony of Noel Anderson.)

Q. Now when during this transition period, Mr. Anderson, did you continue to deal in general with the same, did you or did you not continue to deal with the same, generally the same business houses and the Government offices the farmer ordinarily deals with, that you had been dealing with for some years before under the old partnership?

A. We did.

Q. And during that period of transition did you or did you not specifically tell the business men and these offices that you had transferred to a new partnership at that time, did you say anything about it?

A. No, I didn't make the fact known.

Q. And, of course, generally speaking, Mr. Anderson, did any of these papers you signed prior to May 1st, '46 might have been signed by the old partnership name?

Mr. Angland: Just a minute. The papers speak for themselves.

The Court: He can explain it.

Mr. Lewis: I will withdraw it.

The Court: All right.

Q. You heard the testimony of Mr. Chapman, Mr. Anderson, about the sale of some of the wheat on the list that he testified to. Now as to those sales or references prior to—well, the two items here as of January 10th, '45 and April 15th '45, state what year that wheat or crop would have to be? [334]

A. That would have to be '44 crop.

(Testimony of Noel Anderson.)

Q. And would probably be on the crop of whom?

Mr. Angland: Just a minute. He said "probably."

Mr. Lewis: I will withdraw that.

Q. What would it—who would own that crop?

A. That would be crop on the old partnership of A. E. Anderson & Sons, one-half of which belonged to me and the other half belonging to the A. E. Anderson estate.

Q. I call your attention to the item "10/3/46" marked "Noel," and the item "1/10/47" marked "Noel," did you authorize or did you or did you not authorize the Greely Elevator to put any of this wheat in your name at that time?

Mr. Angland: Just a minute. That is objected to, your Honor. He is attempting by parole evidence to alter the terms of a written statement now in evidence existing between Noel Anderson, Commodity Credit Corporation and Greely Elevator Company.

Mr. Lewis: No, if the court please, I think Mr. Angland is in error; this is not in evidence.

The Court: It isn't?

Mr. Lewis: No, it isn't introduced in evidence.

The Court: He may state whether or not he authorized the use of Noel Anderson or not.

Mr. Lewis: Read the question.

(Question read.)

Mr. Angland: Same objection. [335]

The Court: Well let him answer the question.

(Testimony of Noel Anderson.)

Did you or did you not? Do you remember whether you did or not?

A. I don't recall that I did.

Mr. Lewis: That is all.

Cross-Examination

By Mr. Bowen:

Q. With reference to that last question, Mr. Anderson, about how many transactions in wheat do you have a year in the normal course of business? A. That varies quite a lot.

Y. Could you give me an estimate of the transactions on wheat, barley, oats, and grain that you have any time in a year?

A. It would be hard to give an estimate, some years wheat is sold in large quantities, some small quantities, and it would be impossible to estimate the number of transactions that were made in any one given year.

Q. Would as many as 25 be too few?

A. I would say it would be too many.

Q. How many?

A. As I have said before, I can't estimate the number of transactions. [336]

Q. Then you would have difficulty in recalling of your memory and recollection whether or not you did or did not authorize Greely Elevator Company on January 10, '47 and October 3rd, '46 to a transaction in their books in your name, wouldn't you?

A. Will you state that question again, please.

(Testimony of Noel Anderson.)

Q. You have just stated, Mr. Anderson, that your best recollection is that you did not authorize Greely Elevator Company to enter the transactions referred to in that summary on October 3rd, '46 and Januay 10, '47, which transactions are entered in their books in your name. Now you state that to your best knowledge and recollection you did not authorize them to enter that transaction in your name; you didn't tell them not to, did you?

A. As far as that is concerned I knew where that wheat belonged and who it belonged to.

Q. You say you did?

A. Yes, and the rest of the members of the partnership knew.

Q. So it didn't matter to you personally whether it was entered in your name or not?

A. As far as I was concerned it made no difference.

Q. And you hadn't taken the trouble to advise Greely Elevator Company otherwise?

A. I had at different times but they have to be repeatedly reminded. [337]

Q. With reference to this controversial transaction or two of them in the middle of May, '46, Defendant's Exhibits 48 and 49, with reference to those two exhibits which recorded the transaction originally, which record is maintained by Greely Elevator Company, I refer you to this notation on each, dated May 17th, '46, as to Exhibit 48 and the same date as to Exhibit 49 states Loma in both cases and then "bought of Noel Anderson"; to the

(Testimony of Noel Anderson.)

best of your recollection is that a correct statement?

A. The name Noel Anderson appears there but I can't help it that they only put Noel Anderson on this because the contract is signed by Noel Anderson & Sons.

Q. No, that contract relates to Commodity Credit Corporation? A. The same wheat is involved.

Q. I realize that, Mr. Anderson, but we are talking about another transaction now, not the one by the Commodity Credit Corporation, but the storage of this grain with Greely Elevator Company. Now when you originally brought that grain in and stored it there they recorded that as having been brought and stored in the name——

Mr. Lewis: If the court please, I think there is no foundation for that statement.

Mr. Bowen: The exhibits speaks for itself.

Mr. Lewis: Well that is a little different. I don't think Mr. Chapman testified to any such thing. [338]

Mr. Bowen: I am not referring to Mr. Chapman's testimony. I am referring to the record which after seven years seems to be the best record of what happened there and not a faulty memory. This exhibit says "bought of Noel Anderson" "5/17/46 at Loma Station." In reference to Exhibit 48, 1,686 bushels of wheat; in reference to Exhibit 49, 1,723 bushels of wheat. I submit that that record unless explained otherwise speaks for itself.

Mr. Lewis: If the court please, you will recall

(Testimony of Noel Anderson.)

that under the examination of counsel for the Government Mr. Chapman identified positively these two exhibits as covering the same wheat as is in the two exhibits introduced by the plaintiff in Exhibits 25 and 26, and these exhibits are signed by Noel Anderson & Sons, and now he is attempting to impeach his own witness.

Mr. Bowen: I think that counsel for plaintiff misconstrues this record, your Honor, but to save your time we will ask the reporter to strike that question and all testimony taken in regard to it.

The Court: Very well.

Q. (By Mr. Bowen): With reference to Defendant's Exhibits 42 and 43 and 44, I refer you to this note, Mr. Anderson, and ask you to read that and then I will have a question.

A. The signature of the producer. [339]

Q. I believe I misled you. Oh, yes, that is right.

A. "The signature of the producer is to indicate intent to participate in the 1945 Agricultural Conservation Program and to request County Committee approval for the practices listed in Section 1. Filing of this form by the producer before May 1st, '45 is requested for participation in the 1945 Agricultural Conservation Program. No obligation upon the producer is created by filing this form, nor does failure to file the form have any significance other than ineligibility to apply for program payments."

Q. I think that is enough, thank you, sir. Now on rebuttal just now, Mr. Anderson, you stated that this Exhibit 42 which is entitled "1945 Agricultural

(Testimony of Noel Anderson.)

Conservation Program," and you indicated that it didn't relate to '45 activities. Did I misunderstand you?

A. The '45 work sheet relates only to '45 practices except for strip cropping, as I have stated before, which is a continuous process.

Mr. Bowen: No further questions, your Honor.

Mr. Lewis: That is all.

The Court: Any more rebuttal?

Mr. Lewis: No more rebuttal.

The Court: Very well, gentlemen. I suppose you need some time for brief after you receive a copy of the transcript. [340]

Mr. Bowen: If the court please, before you get into that business defendant wishes to renew his request for dismissal of this action and with your permission would like to argue it.

The Court: Well I don't believe you have got any more cases than I have already considered and this is a very complicated case, and there are circumstances and situations developed here that I don't find in any of these other cases, and it is just a question of what you believe. I think in any event if I permitted you to argue the case, I would overrule you because I have the same notion about it as I had when I overruled your motion at the conclusion of the plaintiff's case. I think that this is a case that is going to have to be studied very carefully. It is complicated and there are a good many circumstances here that I haven't found in some of the other cases that I have examined. Upon

receipt of the transcript the plaintiffs may have 30 days to submit a brief and the defendants 30 days, and 20 days for a reply brief. If you need additional time, either side, for that matter, why you will be given it. Well that seems to be the end of it.

The Court: Court will stand adjourned with the usual order of adjournment. (12:00 noon, [341] 12/13/52.)

In the District Court of the United States, in and for the District of Montana, Great Falls Division

State of Montana,
United States of America—ss.

I, Sidney O. Smith, do hereby certify that I am the Official Court Reporter in the above-entitled court; that the foregoing annexed transcript is a full, true and correct transcription of the proceedings had and taken in cause No. 1306, Noel Anderson, Plaintiff, vs. Collector of Internal Revenue, heard at Great Falls, Montana, on December 11, 12 and 13, 1952.

Dated this 16th day of February, 1953.

/s/ SIDNEY O. SMITH,
Official Court Reporter.

[Endorsed]: Filed February 16, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court in and for the District of Montana, do hereby certify that the papers hereto annexed, and the accompanying Transcript of Evidence, are the originals filed in Case No. 1306, Noel Anderson, Plaintiff, vs. Thomas M. Robinson, Collector of the United States Internal Revenue for the District of Montana, Defendant, and designated by the Defendant as the record on appeal herein.

I further certify that the Complaint, Motion to Dismiss, Answer and Judgment, referred to in the designation, are contained in the Judgment Roll.

I further certify that the "Stipulation of the Parties" referred to in the designation, is Plaintiff's Exhibit No. 40, and is transmitted with the Exhibits in the case.

I further certify that the Exhibits accompanying this Transcript are the originals introduced in evidence at the trial of the cause, except Plaintiff's Exhibits Nos. 10 and 24, which are copies of and substituted for the originals withdrawn by order of Court.

Witness my hand and the seal of said court this 21st day of November, 1953.

[Seal] /s/ H. H. WALKER,
Clerk as Aforesaid.

[Endorsed]: No. 14142. United States Court of Appeals for the Ninth Circuit. Thomas M. Robinson, Collector of Internal Revenue for the District of Montana, Appellant, vs. Noel Anderson, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed November 25, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14142

THOMAS M. ROBINSON, Collector of United States Internal Revenue for the District of Montana,

Appellant,

vs.

NOEL ANDERSON,

Appellee.

DESIGNATION OF RECORD TO BE PRINTED

The appellant hereby designates the entire record on appeal to be printed.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General
Tax Division,

By /s/ ANDREW D. SHARPE,
Chief, Trial Section.

[Endorsed]: Filed December 14, 1953.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON ON APPEAL

The appellant states that this is an appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered in the United States District Court for the District of Montana in the above-entitled case. Pursuant to the provisions of the rules of the United States Court of Appeals for the Ninth Circuit, appellant intends to rely on the following points:

1. The trial court erred in concluding that taxpayer Noel Anderson, his wife Agnes Anderson, and their two sons Robert M. and Noel J. Anderson in good faith and acting with a business purpose intended to join together as of January 1, 1945, for the tax year 1945 in the present conduct of the Anderson ranch as a partnership within the intendment of the laws of the United States pertaining to the internal revenue.

2. The trial court erred in finding that the Government erroneously and illegally collected from taxpayer Noel Anderson the sum of $10,292.84 for 1945.

/s/ H. BRIAN HOLLAND,
Assistant Attorney General
Tax Division,
By /s/ ANDREW D. SHARPE,
Chief, Trial Section.

[Endorsed]: Filed December 14, 1953.

No. 14142

In The United States Court of Appeals

For the Ninth Circuit

THOMAS M. ROBINSON, Collector of Internal Revenue for the District of Montana,

Appellant

v.

NOEL ANDERSON,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLANT

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
ELMER J. KELSEY,
Special Assistants to the Attorney General.

KREST CYR,
United States Attorney.

No. 14142

In The United States Court of Appeals

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KREST CYR,
United States Attorney.

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No. 14142

In The United States Court of Appeals

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v.

NOEL ANDERSON,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the District Court (R. 22-30) is reported at 115 F. Supp. 776.

JURISDICTION

This appeal involves federal income taxes for the year 1945 in the amount of $10,292.84 which was paid by the taxpayer on November 10, 1949. (R. 32.) A claim for refund was filed on or about November 24, 1949 (R. 7), and was rejected by notice dated April 14, 1950 (R. 32). Within the time provided in Section 3772 of the Internal

Revenue Code and on September 8, 1950, the taxpayer brought this action in the District Court for recovery of the taxes paid. (R. 11.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The case was tried by the Court without a jury. (R. 34.) The judgment was entered on June 30, 1953. (R. 35.) Within sixty days and on August 27, 1953, a notice of appeal was filed. (R. 35-36.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the finding of the District Court, that for federal income tax purposes the taxpayer, his wife, and two minor sons, were joined together as a partnership for the present conduct of the Anderson ranch during the tax year 1945, is clearly erroneous.

STATUTE AND RULE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. (26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him—

* * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183(b).

(26 U. S. C. 1946 ed., Sec. 182.)

FEDERAL RULES OF CIVIL PROCEDURE:

RULE 52. FINDINGS BY THE COURT

(a) *Effect.* * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. * * *

STATEMENT

The facts, as taken from the uncontroverted evidence, may be summarized as follows:

Prior to 1935 the Anderson ranch, located in Chouteau County, Montana, was owned and operated by A. E. Anderson, the father of the taxpayer, Noel Anderson. (R. 40-41.) Sometime in 1935 the taxpayer and his father formed a partnership for the operation of the ranch under the name of A. E. Anderson and Son. (R. 42-43.) This partnership continued until the death of the father on Christmas Eve, 1943. (R. 41-43.)

The taxpayer's mother was appointed administratrix of the father's estate (R. 137) and during 1944 the ranch

was operated under the name, A. E. Anderson and Son, pursuant to an agreement between the taxpayer, his mother and sister, the sole distributees of the father's estate (R. 62).

During the lifetime of the father all the property of the partnership including its bank account, had been held in the name of the father, A. E. Anderson. (R. 43.) After the father's death, the taxpayer opened a new bank account in the name of A. E. Anderson and Son on which only he could draw checks. (R. 49-50, Ex. 38, Appendix, *infra.*)

As the former partner of his father in A. E. Anderson and Son, the taxpayer claimed a one-half interest in the Anderson ranch and as one of the three distributees of his father's estate he was entitled to an additional one-third of the other half of the Anderson ranch and one-third of all other property, including the Kingsbury Ranch, which the father had owned apart from the partnership. (R. 48-49, 56-59.)

Sometime in 1944, the taxpayer made an agreement with his mother and sister to purchase their respective interests in his father's estate. (R. 55, 61-63.) This agreement could not be consummated until the spring of 1946 when the estate was ready to be closed. (R. 62.)

In discussions in December 1944 between the taxpayer, his wife, Agnes Anderson, and his son, Robert Anderson, it was orally agreed that a partnership should be formed for the operation of the entire ranch properties. (R. 60-61.) This agreement was subsequently assented to by the taxpayer's son, Noel Junior Anderson,

when he was home from the Army on a furlough in January, 1945. (R. 68, 219.) It had been previously discussed with the taxpayer's tax attorney. (R. 53-55.)

By this agreement the taxpayer and his wife were each to have a one-third interest in the partnership and each of the two boys, Noel Junior, age 19 (R. 229), and Robert, age 18 (R. 236), were to receive an one-sixth interest (R. 60-61, 219-220). The interests of the boys were valued at $7,500 each (R. 248) and were to be paid from the accumulation of their shares of the earnings of the partnership (R. 141, 219-220). The boys were not to receive deeds of their shares until the $7,500 had been completely paid from the earnings. (R. 106, 250.) Meanwhile they were to be given their necessary expenses for support and education. (R. 234-235, 264.) It was stated that the partnership was to commence January 1, 1945. (R. 201.) There was no mention of any consideration to be given by the wife for her one-third share. (R. 60-61, 199-200.)

Prior to 1945 both boys, when home from school or college, worked on the ranch and the wife helped with the cooking and minor farm chores. (R. 45-46, 136, 196.) After 1938 the family lived at the ranch only during the summer months and lived in Fort Benton, Montana, the remainder of the year in order to permit the boys to attend school. (R. 135, 208-209.) Hired help were also employed to do the work of the ranch. (R. 135, 195, 209.) Since about 1940 the taxpayer had known that he suffered from heart trouble and subsequently refrained from heavy work. (R. 51, 253-254, 262.)

The younger son, Robert, attended Montana State College, at Bozeman, for four academic years, 1944-1948, where he majored in industrial engineering. (R. 240.) The elder son, Noel Junior, attended the same college during the school year 1943-1944. (R. 230.) On September 19, 1944, he enlisted in the United States Army and was not discharged until January, 1946. (R. 218-220, 232-233.) In September of 1946 he returned to college and remained there for the school year 1946-1947. (R. 221-222.)

During the entire year, 1945, the elder son, Noel Junor Anderson, was in the military service and thus contributed no services to the running of the ranch (R. 52, 220-221), although he was credited on the account books kept by the taxpayer with, and there was reported in his income tax returns for that year, a full one-sixth of the earnings of the partnership (R. 97, 228, 233-234). During that year the son, Robert, worked on the ranch during the summer vacation from college and for a few days during the branding of livestock in May. (R. 71-72, 241-242.)

Taxpayer testified that his purposes in forming the partnership were to save federal income taxes by splitting the ranch income between the members of his family, and to offer his sons an opportunity to obtain something more than wages for their work. (R. 136-137.)

During the year 1945 all business of the ranch with third persons was conducted in the name of A. E. Anderson & Son, the old partnership, or of Noel Anderson, personally, and no such business was conducted in the name of the alleged new partnership, Noel Anderson &

Sons. (R. 113, 153, 167-168.) During 1945 no bank account existed in the name of Noel Anderson & Sons and such a bank account was not opened until May of 1946. (R. 75, 111-112.) All receipts from sales of livestock and grain from the ranch were deposited in the bank account of A. E. Anderson & Son, the old partnership (R. 75, 156), on which only the taxpayer could draw checks (Ex. 38).

During the year 1945 all the real and personal property of the ranch remained in the record name of the deceased father, A. E. Anderson. (R. 149-150, 155.) Property taxes on all the ranch properties were assessed against A. E. Anderson during the year 1945 and were paid by checks of the taxpayer drawn on the A. E. Anderson & Son bank account. (R. 155, 279-280.) Contracts with Government agencies with respect to conservation projects on the ranch were executed and completed in the name of A. E. Anderson and Son by the taxpayer; none were carried on in the name of the alleged partnership Noel Anderson & Sons. (R. 153-154, 282-290.)

All dealings in wheat and livestock derived from the ranch during 1945 were handled in the name of A. E. Anderson, the deceased father, or A. E. Anderson and Son, the old partnership, none in the name of the alleged new partnership, Noel Anderson & Sons. (R. 113, 150-151, 172-175, 296.) In fact the cattle brands, which were recorded in the name of A. E. Anderson, were not transferred to Noel Anderson & Sons until sometime in 1951. (R. 149-150.)

None of the various purchases of equipment for the ranch in 1945 were made in the name of the alleged new partnership Noel Anderson & Sons. (R. 172-175.)

A considerable portion of the land which constituted the ranch was leased from the State of Montana in the name of the father, A. E. Anderson. These leases were not transferred to the new partnership, Noel Anderson & Son, until 1947. (R. 163-166.)

On October 13, 1945, insurance was written for 15,000 bushels of grain in the name of the taxpayer as the assured, and the premium was paid from the joint bank account of the taxpayer and his wife. (R. 271-277, Ex. 41, Appendix, *infra.*)

The taxpayer kept a cash book of the receipts and expenses of the ranch and an informal ledger showing the status of the interests of the members of the family. (R. 69, 78, 92-100.) These records were not entirely complete (R. 100) and do not bear the name of the alleged partnership (R. 93-94).

In January, 1946, an income tax return for the year 1945 was filed by the taxpayer in behalf of the alleged partnership, Noel Anderson & Sons. (R. 108-110.) At the same time individual returns showing distributive shares of the ranch income were filed in behalf of the boys, Noel, Jr., and Robert, and the wife, Agnes. (R. 108-110.) The returns of the sons were signed in their behalf by the taxpayer, and the taxes on their shares were paid by checks drawn by the taxpayer on his joint bank account with his wife. (R. 144-145.)

Later, in May and June of 1946, the purchase by the taxpayer of the interests of the mother and sister in his father's estate was concluded by their giving deeds of their interests to him in return for the payment by him of approximately $9,000 to each. (R. 63-65, 139-140.) These payments were made partially from the joint bank account of taxpayer and his wife and partially from the bank account of the partnership, Noel Anderson & Sons. (R. 63, 65.) Subsequently, in August, 1946, the assets of the estate of the father, including the Kingsbury ranch which had not been a part of the assets of the prior partnership, A. E. Anderson & Son, were distributed to the taxpayer by a decree of the Probate Court. (R. 67.)

On the audit of the tax returns for 1945, the Internal Revenue Agent reported that no valid partnership for tax purposes existed in that year and, accordingly, that all of the income from the Anderson ranch should be taxed to the taxpayer, Noel Anderson, and none to his wife and sons. (R. 32.)[1] The deficiency resulting from this determination, in the amount of $10,292.84, was paid by the taxpayer on November 10, 1949. (R. 32.) A claim for refund was filed about November 24, 1949 (R. 7) and was rejected by the Commissioner about April 14, 1950 (R. 32). This suit was commenced September 8, 1950. (R. 11.)

The interests of the sons in the partnership, Noel Anderson & Sons were fully paid from the earnings of the

[1] Other adjustments to which the taxpayer agreed resulted in the exclusion from the partnership's return of a certain income which should have been reported by the former partnership, A. E. Anderson and Son. (R. 74-77.)

partnership by sometime in 1950 (R. 102) and deeds of their one-sixth interest in the partnership, executed by the taxpayer and his wife, were given to them on May 15, 1951 (R. 105-107), subsequent to the institution of this suit. At the same time the taxpayer deeded a one-third interest to his wife. (R. 104.)

The District Court, without a jury (R. 34), determined that during the year 1945 the taxpayer, his wife and both sons had been joined together in a valid partnership recognizable for federal income tax purposes (R. 33), and adjudged that the taxpayer was entitled to a refund of the $10,292.84 which he had paid to the Collector (R. 34-35). This appeal in behalf of the Collector followed. (R. 35-36.)

STATEMENT OF POINTS TO BE URGED

1. The finding of the District Court that the taxpayer, Noel Anderson, his wife, Agnes Anderson, and their two sons, Robert M. and Noel J. Anderson, in good faith and acting with a business purpose, were joined together for the tax year 1945 in the present conduct of the Anderson ranch as a partnership for federal income tax purposes was clearly erroneous.

2. The trial court erred in finding that the Collector erroneously and illegally collected from the taxpayer the sum of $10,282.84 for 1945.

SUMMARY OF ARGUMENT

The District Court's finding that the alleged partnership actually existed during 1945 is clearly erroneous. The agreement between the parties contemplated the formation of a partnership at some later date and not for it to exist during that year. The conduct of the parties was also inconsistent with the existence of a partnership in 1945 since all the business of the Anderson ranch was conducted under other names than the alleged partnership. Furthermore, the existence of the partnership in 1945 was impossible because title to the assets of the ranch had not been acquired by any of the parties. In any event the taxpayer retained such complete dominion and control over the property of the enterprise during 1945 that the income therefrom should be taxed to him in its entirety. Furthermore, the son, Noel Junior Anderson, should not be recognized as a partner because he was absent from the ranch and in the military service during the entire year and contributed neither capital nor services to the enterprise during 1945. Likewise, the wife should not be recognized as a partner because no business purpose existed in making her such, and she contributed neither capital nor services to the enterprise during 1945.

ARGUMENT

THE DISTRICT COURT'S FINDING THAT A VALID PARTNERSHIP FOR TAX PURPOSES EXISTED DURING 1945 BETWEEN THE TAXPAYER, HIS WIFE, AND HIS TWO SONS IS CLEARLY ERRONEOUS.

A. *In order for the income to be taxed to the alleged members, the partnership must have existed during the tax year, 1945.*

The controlling principle as set forth in *Commissioner* v. *Culbertson,* 337 U. S. 733, is whether "the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise" as a partnership during the tax year involved. Thus, as stated in *Culbertson* (p. 742):

> The question is * * * whether, considering all the facts—the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent—the parties in good faith and acting with a business purpose intended to join together in the *present conduct* of the enterprise. (Emphasis added.)

In holding that a partnership must exist during tax year, in order to be recognized for federal income tax purposes for that year, and that an agreement to form a partnership in the future will not suffice, the Supreme Court said (p. 740):

> Furthermore, our decision in *Commissioner* v. *Tower, supra,* clearly indicates the importance of participation in the business by the partners during the tax year. We there said that a partnership is created "when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and loses." *Id.* at 286. This is, after all, but the application of an often iterated definition of income—the gain derived from capital, from labor, or from both combined—to a particular form of business organization. A partnership is, in other words, an organization for the production of income to which each partner contributes one or both of the ingredients of income—capital or services. *Ward* v. *Thompson,* 22 How. 330, 334 (1859). The intent to provide money, goods, labor, or skill sometime in the future cannot meet the demands of Secs. 11 and 22 (a) of the Code that he who presently earns the income through his own labor and skill and the utilization of his own capital be taxed therefor. The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income.

This is merely an application of the general rule that, irrespective of the effect of local law upon a transaction, the federal income tax laws tax income to the person whose labor or capital was responsible for its production in the tax year. *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Clifford,* 309 U. S. 331.

The principles of the *Culbertson* case have been applied by this Court in a number of cases, including *Wisdom* v. *United States,* 205 F. 2d 30; *Parker* v. *Anderson,* 186 F.

2d 49, *Toor v. Westover,* 200 F. 2d 713, certiorari denied, 345 U. S. 975; and *Harkness* v. *Commissioner,* 193 F. 2d 655, certiorari denied, 343 U. S. 945.

Harkness v. *Commissioner,* supra, is very similar to the present case. There, the taxpayer, who had been the sole owner of a business, entered into a written partnership agreement with his wife, son and daughter. The agreement by its terms was to become effective January 1, 1943. During the taxable year 1943 both the son (who was in the Army) and the daughter were out of the state and could not have been expected to and did not render any services to the partnership. The taxpayer's purpose in forming the partnership was, as here, (1) to obtain the future services of his children and (2) to obtain advantage of splitting his income for tax purposes. On these facts this Court approved the determination of the Tax Court that no partnership, recognizable for federal income tax purposes, had been in operation during the year 1943, and, at most, the parties had made a contract to create a partnership at later date.

In giving effect to the statements of the Supreme Court in the *Culbertson* case quoted *supra,* this Court, in the *Harkness* case, said (p. 658):

> But the crucial question was whether the new arrangement was really and truly to begin at once, or at some future date, when the desired help of the young men would become available. The Tax Court expressed no doubt of a good faith intent to create a partnership *at some time.* The evidence of what the son and son-in-law did in later years would tend to confirm such an intent. But it would not tend to

> prove intent *presently* to join in the enterprise. What the Tax Court found was that what existed was "an indefinite future plan to operate United Packing Co. as a genuine partnership," and that the Harkness children "were not bona fide partners in 1943."

The *Culbertson* and the *Harkness* cases, *supra,* make it abundantly clear that a crucial question in every case is whether the asserted partnership arrangement was really and truly intended to begin at once or whether it was to begin at some future time. An intent to form a partnership at a future time, when, herein for example, Noel Junior would be home from the Armed Service, Robert would be home from college, and Mrs. Anderson, Noel Junior and Robert would have earned their respective interests in the family ranch so that they could make a contribution to capital, and when probate of the Estate of A. E. Anderson was finally settled, is not sufficient to satisfy the requirements of intent *presently* to join in the conduct of the partnership enterprise in 1945. There is no evidence in the record of this case, other than interested statements of members of the family of what they intended, to prove present action in 1945 as a partnership. Good faith intent to form a partnership in the future is not enough.

Although the agreement in this case may have been legally binding under Montana law for the division of income, the issue in this case is whether a partnership existed in 1945, in good faith and with a business purpose, for the joint operation of the Anderson ranch, so that it may be said that the shares of the income allocated to the wife and children were not merely earned by the father,

the taxpayer, and given to them under the agreement, but were actually earned in that year by the children and wife.

B. *The agreement was to form a partnership in the future, not during 1945.*

As recollected by the parties who testified at the hearing, the family arrangement, as orally agreed upon in December, 1944, and January, 1945, was that the interests in the proposed partnership were to be divided as follows:—one-third to the taxpayer, one-third to his wife and one-sixth to each of the two sons. The sons were to receive their interests when paid for out of the accumulation of their shares of the earnings. (R. 60-61, 106, 219-220, 226.) The sons actually did not fully pay for their shares until 1950 (R. 102) and did not receive conveyances of their interests until May 1951, subsequent to this suit. (R. 105, 250), at which time the wife also received a conveyance of her interest (R. 104).

There was no present transfer of any interest to the sons and wife in 1945, only an agreement by the taxpayer to transfer such interests in the future when the conditions of the agreement had been fulfilled. The sons, in 1945, gave no notes or anything of value for their prospective interests in the partnership, nor did they obligate themselves in any way to render services or pay in the future for their interests. Either of the boys could have abandoned the project without incurring any liability for the payment of their proposed shares in the partnership. Thus, the situation here is different from that presented in other decided cases in which there were docu-

mented complete transfers of interests in a partnership by a taxpayer to members of his family in return for cash, contributions of capital, or promissory nots of the other parties. *Culbertson* v. *Commissioner,* 194 F. 2d 581 (C. A. 5th) after remand by the Supreme Court; *Seabrook* v. *Commissioner,* 196 F. 2d 322 (C. A. 5th); *Commissioner* v. *Western Construction Co.,* 191 F. 2d 401 (C. A. 9th); *Goold* v. *Commissioner,* 182 F. 2d 573 (C. A. 9th); *Green* v. *Arnold,* 87 F. Supp. 255 (N. D. Tex.), affirmed *per curiam,* 186 F. 2d 18 (C. A. 5th).

That present partnership was not contemplated is further indicated by a consideration of the circumstances of the sons at the time the agreement was discussed. Noel Junior was in the Army and on his way to the Pacific theater of the war. He could not estimate when he would be released and be able to return to the ranch. (R. 218-220, 232-233.) Robert had just commenced four years of study at Montana State College in Bozeman (R. 240) and could not be expected to contribute anything, except summer work, during those four years.

The District Court erred in relying upon the services rendered by the sons in 1944, prior to the taxable year involved here, as capital contributions rendered to the partnership. (R. 23, 31.) These services, which were nothing more than work normally done by sons of a rancher (R. 136) and to which the taxpayer, as parent, was entitled by Montana law (*Gilman* v. *G. W. Dart Hardware Co.,* 42 Mont. 96, 111 Pac. 550), were not considered in the agreement of the parties as contributions to the proposed partnership (R. 60-61, 219-220). Also, since at the time the services were performed the partnership had not been

discussed, they could not have been rendered in contemplation thereof.[2]

As stated, the wife did not receive a conveyance of her proposed one-third interest in the partnership until May, 1951, subsequent to this suit, and at the same time as the taxpayer conveyed interests to the sons. (R. 104-106.) The only evidence which tends to show any capital contribution by the wife to the partnership was that the taxpayer drew a check in 1946 on the bank account in which she had a joint interest to pay his mother and sister for their interests in the properties of the ranch. (R. 63-65.) This payment in 1946 corroborates the fact that the agreement did not contemplate the formation of the partnership in 1945.

The District Court erred in relying upon work performed by the wife as being her contribution to the partnership. (R. 28, 31.) This work was not recognized in the proposed partnership agreement (R. 60-61, 219-220) and, in any event, was not of a "vital" nature (R. 196-197). *Commissioner* v. *Culbertson,* 337 U. S. 733, 743.

The terms of the agreement, according to the testimony of the parties and their subsequent conduct, disclose that it was not intended that a partnership, should exist in

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[2] In its opinion and findings of fact the District Court said that the proposed partnership was discussed and planned by the taxpayer's family in the month of April 1944. (R 25, 31.) This finding is unsupported by the record. April 1944 was never mentioned in the testimony of the members of the Anderson family and the only reference to it appears in the partnership income tax return filed for 1945 which is in dispute in this case. The record shows that the taxpayer first discussed the formation of the partnership with his tax attorney in October 1944 and that other discussions followed in December 1944 and January 1945. (R. 53-55, 60-61, 68.)

1945. The brief answers of the interested parties to questions of their counsel that the partnership commenced on January 1, 1945 (R. 201, 220, 251) should not be understood literally in view of the other evidence in the record, outlined *supra*, to the contrary. An express provision in the written partnership agreement in the *Harkness* case, *supra*, that a partnership was to commence on January 1, 1943, was held not to be determinative in view of the evidence in that case that the actual intention was otherwise.

Of course, under Rule 52(a) of the Federal Rules of Civil Procedure, *supra*, the District Court's finding that a partnership for federal income tax purposes existed during 1945 among the members of the Anderson family should not be set aside unless clearly erroneous, and due regard should be given to the opportunity of the trial court to judge the credibility of the witnesses. However, such a finding is never conclusive and—

> * * * is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. *Gypsum Co.*, 333 U. S. 364, 395; *Bjornson* v. *Alaska S. S. Co.*, 193 F. 2d 433 (C. A. 9th); *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.*, 178 F. 2d 541 (C. A. 9th). In this case, despite the unsupported statements of the interested parties that the partnership existed in 1945, we believe that the overwhelming evidence to the contrary is sufficient to show that a mistake was committed by the District Court.

C. *The formation of the partnership was impossible during 1945 because the taxpayer had not acquired the ranch properties.*

That the partnership did not exist in 1945 is proved by the evidence that it was impossible for it to exist in that year. The taxpayer could not have conveyed any partnership interest to his wife or sons in 1945 because he did not then have title to all the ranch property. (R. 61-62.) In 1945 the estate of his father, in whose name the title to all the ranch properties was held (R. 43), was still open with his mother as administratrix, and himself, his mother and sister as distributees (R. 62). The assets of his father's estate included the Kingsbury ranch in addition to the original Anderson ranch in which the taxpayer claimed a one-half interest as the former partner of his father. (R. 46-47.) The taxpayer did not acquire title to all of the ranch properties which were to go into the new partnership until the spring and summer of 1946 when he purchased and obtained conveyances from his mother and sisters of their interest in the property and his father's estate was finally distributed to him. (R. 62-65, 67.)

D. *The conduct of the parties was inconsistent with the existence of a partnership in 1945.*

One of the important circumstances to be considered in determining whether a partnership existed in a given year is the conduct of the parties. *Commissioner* v. *Culbertson,* 337 U. S. 733, 742-743; *Goold* v. *Commissioner,* 182 F. 2d 573, 575 (C. A. 9th).

In this case the taxpayer and the other parties did not reveal by their conduct and dealings with third parties in 1945 that the alleged partnership existed. All transactions during that year concerning the Anderson ranch were conducted in the name of the former partnership, A. E. Anderson and Son, or by the taxpayer personally; none were conducted in the name of the alleged partnership, Noel Anderson & Sons. (R. 113, 153, 167-168.) The bank account remained in the name of A. E. Anderson and Son throughout the year and until May 1946. (R. 75, 111-112.) On this account the taxpayer alone could draw checks. (Ex. 38.)

Livestock and wheat were sold in the name of A. E. Anderson and Son, the old partnership. (R. 113, 150-151, 296-297.) Title to the ranch property including the property leased from the State of Montana remained in the name of the father, A. E. Anderson, throughout the year. (R. 155, 163-166.) The state leases were not transferred to the new partnership, Noel Anderson & Sons, until 1947. (R. 163-166.) The cattle brands were not assigned to the new partnership until 1951. (R. 149-150.) Real estate taxes were paid by A. E. Anderson and Son, the old partnership (R. 155), and conservation contracts with federal agencies were entered into during the year 1945, not in the name of the alleged partnership, Noel Anderson & Sons, but in the name of the former partnership, A. E. Anderson and Son, by Noel Anderson (R. 153-154, 282-290). In the rather extensive record there is not one instance of any dealing in the year 1945 with any third party by the alleged partnership, Noel Anderson & Sons.

The Disrtict Court relied on the evidence that, although there were no transactions in 1945 by Noel Anderson & Sons, all transactions with respect to the Anderson ranch were charged or credited to the accounts of that partnership. (R. 25-26.) These accounts, however, do not bear the name of the alleged partnership (R. 93-94) and were kept personally by the taxpayer with a view to income tax purposes (R. 93, 97, 100). It was admitted that the entries with respect to the status of the interests of the partners were not made until sometime in 1946 and were taken from the tax returns which are in dispute in this case. (R. 97, 99.) The new equipment purchased for the Anderson ranch was not entered as additional capital in these books, which would have been necessary to reflect the actual capital position of the alleged partners, because, as the taxpayer stated, such entries are not made on the tax returns. (R. 100.) Consequently, these books are insufficient evidence that the partnership actually and in good faith existed in 1945.

No disinterested witness was able to testify that he had dealt with, or ever heard of the existence of, the alleged partnership, Noel Anderson & Sons, in 1945, although some had had numerous dealings with members of the Anderson family with respect to the business of the ranch. (R. 172-175, 178-193, 290-303.) According to the *Culbertson* case, 337 U. S. 733, 742, the testimony of such disinterested persons is an important factor in ascertaining whether or not a partnership existed during the tax year.

E. *The taxpayer retained such dominion and control over the property and earnings during 1945 that the income should be taxed to him.*

A partnership is not recognized for tax purposes if one party retains, during the tax year, such dominion and control over the property and earnings that, in view of all the circumstances and as a practical matter, the income should be taxed as his. *Commissioner* v. *Culbertson,* 337 U. S. 733, 747-748; *Helvering* v. *Clifford,* 309 U. S. 331.

In *Toor* v. *Westover,* 200 F. 2d 713, this Court held that a partnership recognizable for tax purposes had not been created when the transferor of a partnership interest had retained many incidents of ownership. This Court concluded in that case (p. 714):

> We conclude that the retention by the donor of so many incidents customarily identified with ownership precluded the donee from becoming the substantial owner of a partnership interest which would entitle the partnership to recognition for tax purposes.

In the present case the taxpayer retained such complete control and dominion over the alleged interests in the partnership of his wife and sons that all the income therefrom in 1945 should be taxed to him under the rule laid down in the cases mentioned above.

The sons, age 19 and 18, respectively (R. 229, 236), were not entitled to draw their earnings from the partnership but received only such sums as the taxpayer might give them for their support and education (R. 234-235, 264). These sums, he, as a parent, was under duty to

provide anyway (*Lay* v. *District Court*, 122 Mont. 61, 198 P. 2d 761), and the partnership agreement made no difference in these amounts. During the year the son, Noel Junior Anderson, actually received none because he was absent in the Army (R. 94-95, Ex. 12-I, Appendix, *infra*), and Robert was given only college expense money in the total sum of only $855 (R. 264, Ex. 12-A, 12-J, Appendix *infra*) out of their respective earnings of $5,741.38 each, as credited upon the alleged books of the partnership (Exs. 12-I, 12-J).

As to the wife there is no proof that she actually was paid any of the earnings. (Ex. 12, R. 99, 211.)

The taxpayer kept the records (R. 99, 249-250) and only he could draw checks on the bank account in which the funds of the enterprise were deposited (Ex. 38).

The taxpayer made all the major policy decisions for the operation of the ranch during 1945. Noel Junior could not have participated because he was absent in the Army (R. 52, 220-221) and Robert, because of youth, deferred to the wishes of his father (R. 263-264).

The absence of realty to the partnership during 1945 is dramatized by the fact that the taxpayer had the income tax returns for 1945 prepared in behalf of his sons, signed by himself, and paid the taxes reported therein from his personal bank account. (R. 144-145.)

Whatever surface changes the alleged partnership agreement may have made in the operation of the Anderson ranch enterprise, the evidence shows that it did not disturb in the least during 1945 the taxpayer's dominion and control over the property or the purposes for which

the income from the ranch property was used. The taxpayer was able, in other words, during that year, irrespective of the agreement, to retain the full enjoyment of all the rights which previously had accrued to him from the property. The situation is similar to that commented upon in the *Clifford* case, p. 336, and *Culbertson* case, pp. 746-747. In the latter case it was said (pp. 746-747):

> It is hard to imagine that respondent felt himself the poorer after this [partnership agreement] had been executed or, if he did, that it had any rational foundation in fact.

Therefore, since the taxpayer actually was responsible for the creation of the income during the taxable year it should be taxed to him and not be permitted to be split among the members of his family by reason of the alleged agreement. *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Clifford,* 309 U. S. 331

The taxpayer's retention of control over all the earnings of the partnership, we submit, confirms our position that the parties did not intend that the partnership should commence during the year 1945.

F. *The son, Noel Junior Anderson, was not a partner for tax purposes during 1945 because he was absent in the Army during the entire year and contributed neither capital nor services to the enterprise.*

It is obvious that the District Court clearly erred in holding that the son, Noel Junior Anderson, was a valid member of the alleged partnership during the taxable year. It was admitted that this son was away in the

Army until January 1946, and consequently, rendered no services to the enterprise, in 1945. (R. 52, 220-221.) The partnership agreement did not provide for his contributing any capital and he contributed none. (R. 141, 219-220.) One-sixth of the earnings of the ranch during the year 1945 were credited to him upon the records kept by the taxpayer and was reported as income to him upon the tax returns prepared in his behalf by the taxpayer. (R. 108-110.)

With respect to Noel Junior, this case is clearly one where the taxpayer is attempting to violate the well accepted principle that income can only be taxed to the person who furnished the capital or services from which it was produced, irrespective of arrangements and agreements for the division of the income with other persons. *Lucas* v. *Earl*, 281 U. S. 111; *Helvering* v. *Clifford*, 309 U. S. 331.

The situation as to Noel Junior is nearly identical with the facts presented to the Supreme Court in *Commissioner* v. *Culbertson*, 337 U. S. 733, and to this Court in *Harkness* v. *Commissioner*, 193 F. 2d 655. In both of those cases, as in the present one, an attempt was made to have a son recognized as a partner for tax purposes, who was absent during the pertinent tax years by reason of service in the military establishment, rendered no services during the year and contributed no capital. In both cases it was held that the son could not be recognized as a valid partner for income tax purposes.[3]

[3] Upon remand, however, of the *Culbertson* case, the Fifth Circuit determined as a matter of fact that the son there involved had made a capital contribution to that partnership, *Culbertson* v. *Commissioner*, 194 F. 2d 581.:

In *Commissioner* v. *Culbertson, supra,* which was followed by this Court in the *Harkness* v. *Commissioner, supra,* the Supreme Court said (pp. 739-740):

> * * * If it is conceded that some of the partners contributed neither capital nor services to the partnership during the tax years in question, as the Court of Appeals was apparently willing to do in the present case, it can hardly be contended that they are in any way responsible for the production of income during those years. The partnership sections of the Code are, of course, geared to the sections relating to taxation of individual income, since no tax is imposed upon partnership income as such. To hold that "Individuals carrying on business in partnership" includes persons who contribute nothing during the tax period would violate the first principle of income taxation: that income must be taxed to him who earns it. *Lucas* v. *Earl,* 281 U. S. 111 (1930); *Helvering* v. *Clifford,* 309 U. S. 331 (1940); *National Carbide Corp.* v. *Commissioner,* 336 U. S. 422 (1949).

With respect to the military service of the alleged partner in the *Culbertson* case, the Supreme Court said in a footnote on page 739:

> Of course one who has been a bona fide partner does not lose that status when he is called into military or government service, and the Commissioner has not so contended. On the other hand, one hardly becomes a partner in the conventional sense merely because he might have done so had he not been called.

The District Court relied upon the work performed by the son, prior to his going into the military service and

after he returned therefrom, as contributions to the partnership. (R. 28-29.) Any work Noel Junior may have performed prior to the date of the formation of the alleged partnership cannot, of course, be considered a contribution to the partnership. Likewise, work performed subsequent to the taxable year is immaterial because, as we have shown above, the income tax is assessed upon income earned during the taxable year, not income derived from work in either prior or subsequent years. *Ginsburg* v. *Arnold,* 175 F. 2d 879 (C. A. 5th).

The District Court also clearly erred in stating that the other son, Robert, had substituted for Noel Junior during 1945. (R. 23.) Such a substitution was not proved because it was not shown that the work performed by Robert was not in his personal capacity. Furthermore, such a substitution cannot be recognized for tax purposes because it would result in taxing the income obtained from the work performed by Robert as income to Noel Junior which is prohibited by the principles stated previously, namely, that, for income tax purposes, transfers of income will not be recognized, and income must be taxed to the person who earns it. *Lucas* v. *Earl,* 281 U. S. 111.

G. *The finding of the District Court that the wife was a partner for federal income tax purposes during 1945 was clearly erroneous since there was no business purpose involved in making her a partner.*

The court below also clearly erred in finding that the wife was a partner during the year 1945. As stated in

Commissioner v. *Culbertson*, 337 U. S. 733, 742-743, the criteria for determining whether a partnership existed for federal income tax purposes is whether—

> * * * the parties in good faith and *acting with a business purpose* intended to join together in the present conduct of the enterprise. (Emphasis added.)

There is no evidence in the record that any business purpose was served by making the wife a partner. The taxpayer stated that his purpose in forming the partnership was to give his sons something better than wages and thus to retain their services on the ranch, as well as to take advantage taxwise of the splitting of the ranch income among the members of the family. (R. 136-137.) There is, however, no evidence as to the purpose for making the wife a partner, other than tax avoidance. It was not even intimated that the agreement was necessary in order for the taxpayer to retain the services of his wife, such as they were.

Furthermore, the proof shows that there was no change in the nature and extent of the services the wife rendered before and after the agreement. (R. 45-46, 136, 196.) The work the wife performed both before and after the agreement was no more extensive or different in nature than that normally performed by the wife of a rancher in the circumstances of the Anderson family. The services consisted, the evidence shows, of housework and minor farm errands and chores. (R. 45-46, 136, 196.)

There was no provision in the alleged partnership agreement for the wife to contribute capital. (R. 60-61,

200, 219-220.) It is immaterial that the taxpayer paid his mother and sister for their interests in the ranch assets by drawing checks in 1946 on the joint account he held with his wife for such contribution of capital by the wife, if it is to be considered such, was not until after the close of the taxable year here involved.

CONCLUSION

It is apparent that no valid partnership existed in the instant case for tax purposes during the taxable year involved. The decision of the District Court is clearly erroneous. It should be reversed and the cause remanded with instructions to enter judgment in favor of the Collector.

Respectfully submitted,

H. Brian Holland,
Assistant Attorney General.

Ellis N. Slack,
Robert N. Anderson,
Elmer J. Kelsey,
Special Assistants to the Attorney General.

Krest Cyr,
United States Attorney.
March, 1954

APPENDIX

EXHIBIT 12-A

Page 1

Robert Anderson 1945

Jan.	2	Check	75.00
	29	Check	55.00
Feb.	15	Check	50.00
Mar.	1	"	55.00
	26	"	90.00
May	1	"	100.00
	21	"	20.00
July	11	Check	20.00
	3	"	20.00
Aug.	11	"	20.00
Sep.	21	"	350.00
			855.00

* * * * *

EXHIBIT 12-H

Noel and Agnes Anderson

P. 58

1945 1945 Partnership Earnings

Aug. 23 Dep. wht. sales 18,483.62

Noel Anderson $11,482.77

Agnes Anderson 11,482.77

* * * * *

EXHIBIT 12-I

Page 60

Noel J. Anderson

Jan. 1, 1945 Share in Partnership.....7500.00

1945 Partnership Earnings.....5741.38

* * * * *

EXHIBIT 12-J

Page 62

Robert M. Anderson

Jan. 1, 1945 Share in Partnership.....7500.00

1945 Partnership Earnings.....5741.38

Cash drawn p. 1..... 855.00

EXHIBIT 38

STIPULATION

With the understanding that evidence not inconsistent herewith may be introduced by either of the litigants, IT IS HEREBY STIPULATED AND AGREED that the following bank accounts were the only accounts found to exist in the Chouteau County Bank, Fort Benton, Montana, in the names of the following:

A. E. Anderson and Son—Opened February 10, 1944. Noel Anderson authorized to sign checks.

Noel Anderson and Sons—Account opened April 30, 1946. Noel Anderson Sr. and Agnes Anderson (his wife) are the only persons certified to sign checks.

Noel Anderson and Agnes A. Anderson—Joint personal account between husband and wife opened December 1, 1941. Both persons mentioned authorized to sign checks.

Noel J. Anderson (son)—Account opened January 30, 1946. This is the personal account of Noel (son) and he is the only person authorized to sign checks.

Robert M. Anderson (son)—Account opened December 19, 1949. This is the personal account of Robert (son) and he is the only person authorized to sign checks.

The opening entry to the credit of the account of Noel Anderson and Sons was a credit entry of $13,064.00, of which $12,939.30 was carried over from the account of A. E. Anderson and Son when the latter account was closed out April 30, 1946. The carry over from the account of A. E. Anderson and Son, together with a small Treasury Check deposited to the credit of Noel Anderson and Sons,

accounts for the $13,064.00 opening credit to the latter account.

DATED this 12th day of December, 1952.

* * * * *

EXHIBIT 41

ASSURED'S LEDGER-LINE RECORD

Date—October 13, 1945

Assured—Noel Anderson — Paid

Fort Benton, Montana — 11/1/45

For Insurance as Follows:

Expiration	Policy No.	Company	Kind of Insurance	Property Covered	Amount	Rate	Premium Due
10-30-46	83835	Rky Mt	Fire	Grain in Storage	15,000	.75	112.50

THANKS

Property Covered

Policy mailed 10-13-45.

No. 14142

In The United States Court of Appeals For the Ninth Circuit

THOMAS M. ROBINSON, Collector of Internal Revenue for the District of Montana,

Appellant

v.

NOEL ANDERSON,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

VERNON E. LEWIS,
Attorney for Appellee
Fort Benton, Montana

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Fort Benton, Montana

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TABLE OF CASES

Table of Cases:—(Continued)

STATUTES

No. 14142

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the District Court (R.22-30) is reported at 115 F. Supp. 776.

JURISDICTION

This appeal involves federal income taxes for the year 1945 in the amount of $10,292.84 which was paid by the taxpayer on November 10, 1949. (R. 32.) A claim for refund was filed on or about November 24, 1949 (R. 7), and was rejected by notice dated April 14, 1950 (R. 32). Within the time provided in Section 3772 of the Internal Revenue Code and on September 8, 1950, the taxpayer brought this action in the District Court

for recovery of the taxes paid. (R. 11.) Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. The case was tried by the Court without a jury. (R. 34.) The judgment was entered on June 30, 1953. (R. 35.) Within sixty days and on August 27, 1953, a notice of appeal was filed. (R. 35-36.) Jurisdiction is conferred on this Court by 28 U. S. C., Section 1291.

QUESTION PRESENTED

Whether the findings of the District Court "that the plaintiff, Noel Anderson, Agnes Anderson, Noel J. Anderson and Robert M. Anderson joined together as partners in good faith in the months of December of 1944 and January of 1945 for the purpose of conducting a farming, ranching and livestock business in Chouteau County, Montana, that said partnership conducted said operations during the entire year of 1945 and that each of the members of said partnership shared in said operations and the profits thereof," is clearly erroneous.

STATUTES AND RULE INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or

profits and income derived from any source whatever. * * * (26 U. S. C. 1946 ed., Sec. 22.)

SEC. 181. PARTNERSHIP NOT TAXABLE

Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. (26 U. S. C. 1946 ed., Sec. 181.)

SEC. 182. TAX OF PARTNERS.

In computing the net income of each partner, he shall include, whether or not distribution is made to him - * * *

(c) His distributive share of the ordinary net income or the ordinary net loss of the partnership, computed as provided in section 183 (b). (26 U. S. C. 1946 ed., Sec. 182.)

"PARTNERSHIP AND PARTNER. The term partnership includes a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation, and the term 'partner' includes a member in such a syndicate, group, pool, joint venture, or organization." Sec. 3797 (a) (2) of the Internal Revenue Code and Sec. 1111 (a) (3) of the 1932 Act.)

FEDERAL RULES OF CIVIL PROCEDURE:

RULE 52. FINDINGS BY THE COURT

(a) Effect. * * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. * * *

STATEMENT

The Apellant in his statement beginning on page 3 of his Brief has omitted some important facts and misinterpreted others so

that we feel that a further statement is necessary. The statement beginning with the last paragraph on page 3 is not a complete statement of the particular fact involved therein. The fact is that the care, harvesting and marketing of the 1944 crop, only, was handled under the name of A. E. Anderson & Son by agreement between the taxpayer, his mother, and sister. (R. 62.) Any operations in 1944 for the 1945 crop were conducted by the new partnership. (Appellant's Brief 3-5) (R. 71.)

On page 5 of his Brief, Appellant states, referring to the Anderson boys, that "they were to be given their necessary expenses for support and education". They were not "*given*" their necessary expenses, the boys had the right to draw necessary expenses for their needs and education all of which amounts so drawn were chargeable against their respective accounts in the partnership. (R. 234 and 264.)

Appellant states on page 5 of his Brief that "the wife helped with the cooking and minor chores". This is not a correct statement of the facts. At no place in the testimony was there a reference to "MINOR farm chores". Actually her work consisted not only of milking cows but driving tractor and truck, hauling grain, poisoning grasshoppers and pulling hay up on the stack, day after day. (R. 45, 46, 194-197)

On page 6 of his Brief, Appellant states, referring to Noel J. Anderson, "in September of 1946, he returned to college and remained there for the school year 1946-1947". This is not a fact. Noel J. Anderson attended the first two quarters, only, of

the school year 1946 and 1947 and returned to the ranch in time for the spring work in 1947. (R. 222.)

On page 7 of his Brief, Appellant states that "all dealings in wheat and livestock DERIVED from the ranch during 1945 were handled in the name of A. E. Anderson, the deceased father". This is not true for the reason that a large part of the wheat grown in 1945 was not sold until the spring of 1946 and when it was sold, it was sold in the name of Noel Anderson & Sons. (Ex. 25 and 26 and R. 113, 114, 157.)

On page 8 of Appellant's Brief, Appellant states that the individual income tax returns for 1945 of Noel, Jr., and Robert were signed by Noel Anderson. The statement gives no reason for this action on the part of Noel Anderson. The facts are that the reason Noel Anderson signed his sons' names by him, to the 1945 returns was that at that time, the law required that the returns be made by January 15th. Noel J. Anderson was on his way to the Pacific at that time and there was no opportunity for him to sign a return. Robert M. Anderson was in college 200 miles away from the Anderson ranch and the time allowed for the filing of the returns was not sufficient to send the return to Robert M. Anderson to sign and get it back for filing within the time required by law. (R. 144, 145, 220.)

APPELLEE'S FURTHER STATEMENT

In addition to the statement given in Appellant's Brief, the following summary of facts is essential to a proper consideration of this case.

Noel Anderson began farming with his father on the lands

involved herein in the year 1917. In 1935, he and his father, A. E. Anderson formed a partnership for the purpose of engaging in farming and livestock operations on the ranch located in Chouteau County, Montana. The first federal partnership return was filed in 1935 or 1936 (R. 42). All of the Federal income tax returns from 1941 on were audited by the Bureau of Internal Revenue and the partnership of A. E. Anderson & Son was approved by the Bureau (R. 49). The joint account of Noel and Agnes Anderson was started in the Chouteau County Bank in 1941 (R. 44). Their share of the earnings from the old partnership during the entire period and up to the date of the death of A. E. Anderson were deposited in this joint account (R. 44). Agnes Anderson, the wife of the plaintiff, and the two boys, Noel J. and Robert M. worked in the old partnership. Agnes cooked for the hired help, drove truck and tractor and worked in the field in the haying operations (R. 45, 46, 194-197). The farming operations for the 1944 crop began in the spring of 1943 and this crop was seeded and growing at the time of A. E. Anderson's death (R. 47-48). After the death of A. E. Anderson, a federal estate tax return was filed in which the entire interest in the Kingsbury land was returned as the property of the deceased and all other property in connection with the farming and ranching venture was returned as one-half only owned by A. E. Anderson. This return was audited by the Bureau of Internal Revenue and so far as the partnership was concerned was accepted without any change whatsoever. (R. 49.)

The validity of the partnership of A. E. Anderson & Son

for tax purposes or otherwise has never been questioned by the Bureau of Internal Revenue. (R. 43.) It had been a common practice for the partnership to hold over wheat in storage from one year to the next (R. 50) and considerable wheat belonging to the old partnership was on hand at the time of the death of A. E. Anderson. During the period from the date of the death of A. E. Anderson thru the closing up of the A. E. Anderson & Son partnership and through the period necessary for the probating of the A. E. Anderson Estate, a considerable period of time elapsed. The partnership could not be closed until sometime in the spring of 1946 and because of the delay in the audit of the federal estate tax return and other matters, the estate could not be closed until the summer of 1946. This has been termed the transition period (R. 62 and 75). During this period, Noel Anderson was conducting the affairs of the old partnership, was supervising the probating of the estate for his mother who was the administratrix and was working with other members of the family in the establishment of the new partnership of Noel Anderson & Sons. (R. 75).

To simplify the accounts, Noel Anderson maintained one bank account of A. E. Anderson & Son and the closing business of the old partnership, part of the receipts of the estate, and the necessary expenses for the first year of the new partnership were handled through this one bank account. (R. 75). There was no money on hand in the new partnership during the season of 1945 with which to pay the expenses. (R. 74.) Noel Anderson had had no training in accounting (R. 75). During this

entire period, the legal title to all of the property involved in this case remained in the name of A. E. Anderson. The payment to the mother for her share in the property of the A. E. Anderson Estate was made by check drawn on the joint bank account of Noel Anderson and Agnes Anderson (R. 64) and the payment to the sister for her share of the property of the estate was made by check for $4028.28 drawn on the joint bank account of Noel Anderson and Agnes Anderson (R. 64) and by a check for $5000.00 drawn on the account of Noel Anderson & Sons (R. 65), the reason being that there was not sufficient funds in the joint account at the time to pay the entire amount. However, the sum drawn on the Noel Anderson & Sons account was charged to the account of Noel and Agnes Anderson and appears as the second item on Plaintiff's Exhibit 12 H.

The testimony of Noel Anderson, Agnes Anderson, Noel J. Anderson and Robert M. Anderson, all show that the agreement to form a new partnership under the name of Noel Anderson & Sons was made at a family conference during Christmas week of 1944. The new partnership had been planned since April of 1944. (See the partnership return, a part of Ex. 24) (R. 109, 53, 55, 56, 57, 199, 262). The details of this partnership, though verbal, were fully worked out at this conference. Noel Anderson and Agnes Anderson had agreed between them that the property coming to them from the A. E. Anderson & Son partnership and the A. E. Anderson Estate should be owned in equal shares (R. 61). The boys had worked on the farm during the entire season of 1944 and the only wages they had received

was the pay for helping to harvest the 1944 crop which was the property of the A. E. Anderson & Son partnership. They both worked in the preparation of the seeding of the crop for 1945 during the season of 1944 amounting to 1100 acres, doing most of the work including all of the seeding, (R. 51 and 242). And the crop growing on January 1, 1945, was included in the assets of the new partnership. The operations on the ranch were started under the new partnership right away after January 1, 1945 (R. 71). The accounts of the new partnership were kept separate from the accounts of the old partnership and of the estate. The new partnership accounts were kept in a cash book (Ex's. 9 A,B,C,D, and E) and the ledger accounts of the respective partners were kept in a separate book (Ex's. 12 A,B,C,D,E, F,G,H,I, and J) which were received in evidence without objection (R. 99). Noel Anderson had been an active partner in the partnership of A. E. Anderson & Son for a period of nine years. During all of which time all of the partnership property had been in the name of A. E. Anderson and Noel did not consider the name of the new partnership or the use thereof as important during any of the transition period (R. 167-168). The new name of Noel Anderson & Sons came into general use and the new account of Noel Anderson & Sons was started in the Chouteau County Bank on April 30, 1946, which was as soon as the business of the old partnership and the estate had reached the stage to justify the closing thereof. Beginning with the opening of the new account in the Chouteau County Bank on April 30, 1946, all income from the partnership of Noel Ander-

son & Sons and all bills owing by the new partnership were handled through the new Bank account. This account has been maintained continuously and still is maintained as the bank account of the partnership (R. 103). Some of the wheat grown in 1945 was sold in the fall of 1945 but the credits for the sale of this wheat were all entered on the cash account of the new partnership (Ex. 9A). Some of the wheat raised in 1945 was stored on the ranch and in the month of May, 1946, Contracts for sale of the wheat were entered into with the Commodity Credit Corporation (Ex. 25 and 26. R. 113, 114, and 157). This transaction was made under the bonus program of the Government in effect at that time.

The purpose of the ledger accounts and their contents were thoroughly explained by Noel Anderson (R. 94 to 99) and later by each of the two boys. It was distinctly understood that the boys were not to receive the Deeds covering their interests in the real property until their debts to their father and mother were fully paid from their share of the earnings in the partnership (R. 106, 226, and 250). Ex's. 21, 22, and 23 represent the Deeds to Agnes Anderson, Noel J. Anderson, and to Robert M. Anderson for their respective shares in the real property of the partnership, admitted in evidence (R. 106-107).

There was no question of any kind raised by the Bureau of Internal Revenue as to the validity of this partnership until the month of March, 1947 (R. 110). Part of the crop of Noel Anderson & Sons raised in 1945 was sold in 1946 in the name of Noel Anderson & Sons. (Ex. 25 and 26, R. 113, 114 and

157). The proceeds from the cattle sold in the fall of 1945 were deposited in the account of A. E. Anderson & Son but full credit was given for these payments in the cash book of Noel Anderson & Sons (Ex. 9 A, R. 156). The taxes for the year 1945 were charged as expense against Noel Anderson & Sons (R. 159).

DISCUSSION OF APPELLANT'S ARGUMENT

Appellant presents his argument under the following general headings:

"*A. In order for the income to be taxed to the alleged members, the partnership must have existed during the tax year, 1945.*"

"*B. The agreement was to form a partnership in the future, not during 1945.*"

"*C. The formation of the partnership was impossible during 1945 because the taxpayer had not acquired the ranch properties.*"

"*D. The conduct of the parties was inconsistent with the existence of a partnership in 1945.*"

"*E. The taxpayer retained such dominion and control over the property and earnings during 1945 that the income should be taxed to him.*"

"*F. The son, Noel Junior Anderson, was not a partner for tax purposes during 1945 because he was absent in the Army during the entire year and contributed neither capital nor services to the enterprise.*"

"*G. The finding of the District Court that the wife was a partner for federal income tax purposes during 1945 was clearly erroneous since there was no business purpose involved in making her a partner.*"

We will attempt to discuss these questions in order and in the light of the principles laid down in Commissioner vs. Culbertson, 337 U.S. 733, which may be summarized in one sentence as follows:

> "If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, having agreed that the services or capital *to be contributed presently* by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient." (Emphasis supplied)

The questions raised under Appellant's divisions A and B may be discussed together.

THE ONLY QUESTION INVOLVED

WAS THE PARTNERSHIP TO TAKE EFFECT IN 1945?

The Appellant has admitted that the Agreement by members of the Anderson family to form a partnership was made in good faith but insists that it was not to take effect in 1945 but "at some future time". (Appellant's Brief 4, 5, and 16.)

The entire defense in this case centers around an attempt to prove that the ranch operations of the Anderson family in 1945 were not conducted in the name of Noel Anderson & Sons and that the property during said year was held in the name of A. E. Anderson. We submit that the partnership name, or the lack of one, or who has the legal title to the property, is entirely immaterial. (Gaspar vs. Buckingham 116 Mont. 236; 153 P.2d. 892).

It was especially unimportant in the thinking of Noel Anderson. The partnership of Noel Anderson & Sons is a direct successor to the partnership of A. E. Anderson & Son. For approximately nine years, Noel Anderson had been a member of the partnership of A. E. Anderson & Son. During all of that period, he owned a one-half interest in the partnership and the partnership property and received one-half of the profits and yet during the entire period all of the property was in the name of A. E. Anderson, personally. Most of the business was transacted in the name of A. E. Anderson and all of the income was deposited in the name of A. E. Anderson in the Chouteau County Bank. In spite of that fact, the Bureau of Internal Revenue recognized the partnership as valid for tax purposes and has never at any time questioned the legality thereof. (R. 43.)

The Appellant insists there was no present transfer of interest to the sons and wife in 1945. He entirely overlooks the fact that all of the farm machinery and equipment and all of the cattle as well as the use of all of the land including the State land was actually in the possession of, and used, by all members of the Anderson family in the year 1944 and during the entire year of 1945 for the purpose of producing the income of this partnership in the year 1945. Exhibit No. I is a statement of the property both real and personal that was turned into the partnership at the time of its formation by Noel Anderson and Agnes Anderson (R. 61). The real estate was listed at $20,410.75, the machinery, equipment and miscellaneous items were listed at $7,904.25, and the livestock was listed at $16,695.00, mak-

ing a total of $45,000.00. Noel Anderson and Agnes Anderson each contributed 1-3 of this, totaling $30,000.00. The two boys agreed to pay $7500.00, each, for a 1-6th interest in the property to be paid from their share of the profits beginning in the year 1945. Exhibit 12-I shows Noel J. Anderson contributed as capital in 1945 the sum of $4566.48 as a payment upon his debt of $7500.00. Exhibit 12J shows that Robert M. Anderson contributed $3711.48 as capital in 1945 being his net payment on his debt of $7500.00.

The court will take note of the fact that the 1100 acres of growing crop was not mentioned or listed in the property to be transferred by Noel and Agnes Anderson to the new partnership (Exhibit I). There was a very good reason for this fact. Each member of the new partnership had contributed to the work involved in the year 1944 toward the growing of that crop and none of them had received any pay of any kind for their work. The Appellant insists that the work of the sons in 1944 was only work that would normally be done by the sons of any rancher and that the work of Agnes Anderson consisted of "minor chores". It is quite apparent that Appellant is not familiar with the farming practice in that part of Chouteau County in which the Anderson ranch is located. The work for the 1945 crop was begun in the spring of 1944 and the cultivating of the ground was continued through the summer of 1944. The cultivated land consisting of 1100 acres was seeded to winter wheat in the month of September, 1944. (R. 71, 72, 218, 239, 242, 254) Noel and Agnes

Anderson had furnished the seed for this crop while Noel J. Anderson and Robert M. Anderson had done the most of the work involved in the cultivating and seeding of the entire 1100 acres, (R. 254) Noel J. Anderson having seeded approximately ½ of the crop. (R. 217). Both boys worked looking after the cattle during the year 1944. (R. 240) Agnes Anderson drove the machinery for the poisoning of grasshoppers on the crop during the year 1945. She cooked for the men during the branding season in the spring of 1945 and again for the harvest season in 1945. (R. 196). She also hauled the wheat fifteen miles to the Loma elevator. (R. 202) Robert worked through the entire season of 1945, branding the cattle, looking after the cultivating of the ground and the seeding thereof for the 1946 crop and he also worked through the entire season harvesting the 1945 crop—all of this work being done before he left to attend college in the fall. (R. 241-242) The care of the cattle by the two boys in 1944 was a direct contribution to the raising of the 78 calves the increase of the cattle herd in 1945 which increase were marketed by the partnership on October 16, 1945, and the proceeds of which appear as an item of income on the third to the last line of Exhibit 9A. All of these services and many more performed by the members of this partnership can hardly be classed as work that the "ordinary ranch sons" might do or "minor chores" to be performed by the wife.

We take no particular exception to Appellant's statement of the law as set forth on page 12, 13, and 14 of Appellant's

Brief. However, we cannot agree with his application of the law to the case at issue. The facts in the case of Lucas vs. Earl 281 U.S. 111, Helvering vs. Clifford 309 U.S. 331, Wisdom vs. U.S. 205 F.2d. 30, and Toor vs. Westover 200 F.2d.713 cited by Appellant are so different from the facts in the instant case that they have no bearing whatsoever except as they might contain a general statement of the law. In the Lucas case, the taxpayer attempted to assign a portion of his salary to his wife and on the basis of that filed a partnership return. In the Helvering case, the question involved a trust set up for the benefit of the members of the family. In the Wisdom case, the taxpayer was a broker acting as selling agent for certain brewing companies. He earned all of the income but attempted to bring his wife and two married daughters into the partnership. The Toor case also involved a trust set up for two of the taxpayer's children as partners. None of these cases are, therefore, in point. There are many cases with similar facts to the case at issue to which we might refer for a statement of the law. Reference to Commissioner vs. Culbertson, 337 U.S. 733, would seem to be sufficient particularly in view of the fact that the facts in the Culbertson case are very similar to the facts involved herein.

> "The question is not whether the services or capital contributed by a partner are of sufficient importance to meet some objective standard supposedly established by the Tower case, but whether, considering all the facts - the agreement, the conduct of the parties in execution of its provisions, their statements, the testimony of disinterested

persons, the relationship of the parties, their respective abilities and capital contributions, the actual control of income and the purposes for which it is used, and any other facts throwing light on their true intent - *the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise.*"

"If, upon a consideration of all the facts, it is found that the partners joined together in good faith to conduct a business, *having agreed that the services or capital to be contributed presently by each is of such value to the partnership that the contributor should participate in the distribution of profits, that is sufficient.*" (Emphasis supplied)

APPELLANT CLAIMS THAT THE FORMATION OF THE PARTNERSHIP WAS IMPOSSIBLE DURING 1945 BECAUSE THE TAXPAYER HAD NOT ACQUIRED THE RANCH PROPERTIES

This contention is hardly worthy of discussion. Noel Anderson had never had legal title to any property prior to 1945 and he did not have legal title to any of the property during any part of the year 1945. In spite of that fact, he had been the actual owner of a half interest in all of the real property, farming equipment and cattle as a full partner of A. E. Anderson & Son for a period of approximately nine years prior to 1945 and during all of said period he had received one-half of the profits thereon and during all of said period partnership returns together with individual income tax returns were filed by A. E. Anderson and Noel Anderson which partnership returns had been audited by the Bureau of Internal Revenue and had been

recognized by said Bureau as valid for tax purposes. If we carry Appellant's contention to a logical conclusion, since Noel Anderson had no title to the property involved in 1945, he could not be taxed with the income from said property. Under such an argument, the Culbertson boys involved in the Culbertson case, supra, could not have shared as partners in their ranching operations for their interests were not paid for during the years involved and they held no title to the property, yet in spite of that fact, the Court of Appeals in the final decision in this famous case held the boys to be full partners. Culbertson vs. Comm. (5th) 194 F.2d. 581.

Regardless of who held the legal title to the property—the real estate, farming equipment and the cattle—the fact remains that this property was turned over to the members of the new partnership as soon as it was formed and this property was used by all members of the partnership in the production of the income for 1945. The growing crop toward which all members of the family had contributed labor in 1944 became a part of the assets of the new partnership immediately upon its formation. It seems unnecessary for us to pursue this argument further.

APPELLANT INSISTS THAT THE CONDUCT OF THE PARTIES WAS INCONSISTENT WITH THE EXISTENCE OF A PARTNERSHIP IN 1945

The answer to this contention is that the name under which the partnership operated or the question of who was the legal owner of the property are absolutely immaterial. The important

question is who actually conducted the farming operations and who earned the income? Appellant makes reference to the State land leases (Appellant's Brief 21). A reference to Exhibits 28 and 29 will show that the leases were made in 1943 for a ten year period in the name of A. E. Anderson; the formal written assignments were made in March of 1947, which, by the way, was before any audit had been made of the Noel Anderson & Sons partnership by the Bureau of Internal Revenue. The land included in these leases was turned over to the new partnership for farming purposes along with the other property on January 1, 1945. The fact that the formal assignment was not made until March, 1947, has no bearing upon the question of the validity of the partnership. The rentals for these State lands for the year 1945 were paid by the new partnership and charged on the partnership expense account. (Exhibit 9B). Appellant (his Brief 21) states that the conservation contracts with the Federal agencies were entered into during the year 1945 in the name of the former partnership—ignoring the fact that the A.A.A. office, as was the custom, followed the record title of the land involved. However, again the important thing is, who paid for the services rendered? A reference to Exhibit 9D, entry on the fourth line from the bottom of the page, shows that the dam constructed under these plans was paid for by the partnership and charged in the expenses on the partnership returns. Appellant, in his Brief 21, comments upon the fact that the bank account remained in the name of A. E. Anderson & Son during the year 1945. Where the money was actually deposited is of

little moment so long as the books of the partnership show an account thereof and in this connection we call the Court's attention to the item of net income of the partnership for 1945 as shown by Exhibit 10. This amount is $21,599.78. Exhibit 12, the partnership ledger, shows the charges made for payment of income taxes both Federal and State for the year 1945 which, of course, were paid early in the year 1946. The aggregate amount of these taxes is $9411.52. When this amount is deducted from the net income of the partners, we have the sum of $12,168.26 which is approximately the same amount that was carried over to the bank account of Noel Anderson & Sons on April 30, 1946, from the account of A. E. Anderson & Son (Exhibit 38; Appellant's Brief 33). The important fact in this connection is that upon the opening of the new partnership account, the balance on hand as shown by the partnership books was transferred to the new account. Appellant mentions the fact that the real estate taxes were paid in the name of A. E. Anderson & Son. The court will take judicial notice of the fact that taxes are levied in the name of the person who holds the legal title to the property. Of course, during 1945, the estate of A. E. Anderson had not yet been closed and naturally the taxes would be assessed in the name of A. E. Anderson. However, the important question is, who paid the taxes? The entry of November 1st, Exhibit 9E, shows that the taxes both real and personal for 1945, were paid by the new partnership and charged to partnership expense. Appellant further comments upon the fact that the cattle brands were not assigned to the new partnership until

1951. Again we submit that the question of the registered owner of the brand has no bearing in view of the fact that Exhibit 9A, the item for October 16th shows the entry of income of the sum of $3952.24 for the sale of 78 calves which were the increase of the cattle for 1945.

Appellant, in his statement on page 21 of his Brief, infers that all of the wheat raised in 1945 was sold in the name of A. E. Anderson & Son. Again the partnership record Exhibit 9A, the items for August 21, 1945, to September 10, 1945, show the sale of wheat aggregating $28,159.81 which, of course, is a credit of this amount on the books of account of Noel Anderson & Sons. This, by the way, is the exact amount of income from the payment of grain as shown on the first part of Schedule 1040F - a part of Exhibit 10, the income tax return for 1945.

While we realize that the objections made in this connection by the Appellant constitute almost his complete defense in this case, yet we insist that none of these points are important in determining whether the partnership was actually formed and in operation in 1945. In the case of Gaspar vs. Buckingham, (supra), the Montana Supreme Court had before it the question of a partnership between two brothers. The two brothers had pooled their savings, leased land in the name of the older brother, purchased livestock and branded it with the brand recorded in the name of the older brother, deposited the funds belonging to the livestock operation in the name of the older brother and had conducted all of the business in the name of the older brother. After the older brother's death, the question of whether

there was a partnership came into the Courts for decision. In deciding in favor of the validity of the partnership, the Court said:

> "Existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. * * * The existence of the partnership may be implied from circumstances. * * * Where from all of the evidence it appears that the parties have entered into a business relation combining their property, labor, skill and expenses or some of these elements on the one side and some on the other for the purpose of joint profits, a partnership will be deemed established."—Gaspar vs. Buckingham, 116 Mont. 236, 153 P.2d. 892.

The question is, whether the members of the partnership of Noel Anderson & Sons following the intention shown in the partnership agreement of December, 1944, did in due course acquire the property and conduct the farming and ranching venture as a partnership and the events occuring in the years following may be taken into consideration in determining the true intent of the parties. (Harkness vs. Comm. 193 F.2d.655.)

APPELLANT ASSERTS THAT TAXPAYER RETAINED SUCH DOMINION AND CONTROL OVER THE PROPERTY FOR EARNINGS DURING 1945 THAT THE INCOME SHOULD BE TAXED TO HIM

We do not think that the evidence bears out this contention:

1. Investments made in new farm machinery, additional land, and decisions on other matters of general policy were only made

after family conferences in which all members of the partnership took part. (R. 203, 226-228, 256, 257.)

2. Mrs. Anderson could at all times, and did write checks in payment of business expenses. There was no working capital in the new partnership and of necessity the expenses for 1945 were in part, at least, paid from the joint bank account of Noel Anderson and Agnes Anderson, some of the expenses being paid by checks written by Agnes Anderson. (R. 205)

3. Noel J. Anderson and Robert M. Anderson could at all times and did draw whatever portion of their share in the profits as was necessary to to meet their needs, including spending money. (R. 234, 264)

4. At the end of the 1945 year, each member of the partnership was credited on the books of the partnership with his or her full share of the net income. (R. 94-99)

5. A large part of the 1945 crop was sold under written contract to the government and the contract was signed by Noel Anderson & Sons. (R. 114)

6. The net income remaining in the account of A. E. Anderson & Son was transferred to the account of Noel Anderson & Sons when that account was opened April 30, 1946. (Exhibit 38; Appellant's Brief 33). Appellant states that Noel Anderson retained "the full enjoyment of all the rights which previously had accrued to him from the property". (Appellant's Brief 25). Of course, the record shows that Noel and Agnes Anderson had a one-half interest only in the property under the old partnership. Immediately upon the formation of the new partnership,

Noel Anderson became the owner of one-third, only, and Agnes Anderson the owner of one-third. Noel Anderson was in poor health and his duties during 1945 were largely supervisory while the other members of the partnership performed most of the labor. The taxpayer did not retain full control over the farming operations during 1945.

APPELLANT INSISTS THAT THE ABSENCE OF NOEL JUNIOR ANDERSON IN THE ARMY IN 1945 PRECLUDES HIS ENTRY INTO THE PARTNERSHIP.

Appellant cites Comm. vs. Culbertson, 337 U.S. 733, as authority for this contention. As the Court recognizes, the facts in the Culbertson case are very similar to those in the instant case. Similarity was pointed out by Judge Pray in the decision of the Court below but apparently Appellant has overlooked the final decision in this case 194 F.2d. 581. In this final decision, the Court said:

> "For the reasons stated in and upon the authority of Culbertson vs. Comm. 5th Cir. 168 F. 2d. 976 and Comm. vs. Culbertson 337 U.S. 733; 69 S.Ct. 1210; 93 L. Ed. 1659, the decision and judgment of the Tax Court is reversed with directions to disallow the deficiencies."

In the first Court of Appeals decision, 168 F.2d. 976, the Court said:

> "The fact that the boys were called into military service by the United States as well as the fact that some of them had not, during the tax period, completed their education so as to devote their full time and attention to the partner-

ship is in no wise indicative that the partnership was formed for the purpose of dividing the family income, or for the purpose of income tax savings. The failure by a partner to render service to the partnership or to contribute capital originating with him is, after all, but a circumstance to be considered in determining the reality or actuality of an alleged family partnership". * * *

"Moreover a partnership is formed to act in the future and not in the past when it is fully expected, intended, and agreed that the incoming partner will render services to the partnership, the Government should not be heard to say, 'I will not recognize you as a partner even though you in good faith entered into it. I took you into the Army to fight a war and you did not perform services for the partnership as you had agreed to do.' "

The facts in this case are much stronger than the Culbertson case. Noel J. Anderson did contribute services which were directly responsible for a large part of the 1945 income. He helped care for the cattle that produced the 78 calves which were sold in 1945 and he worked in the field summerfallowing, cultivating and seeding one-half of the large crop of 1100 acres that yielded so well in 1945. The fact that Noel J. was not on the farm during any part of 1945 does not affect his right to be considered a full partner.

"Neither statute, common sense, nor impelling precedent requires the holding that a partner must contribute capital or render services to the partnership prior to the time that he is taken into it. These tests are equally effective whether the capital and the services are presently contributed and rendered or are later to be contributed or to be rendered." —Culbertson vs. Comm. 168 F.2d. 976.

APPELLANT CLAIMS THAT INCLUDING THE WIFE IN THE PARTNERSHIP FOR 1945 SERVES NO BUSINESS PURPOSE

Mrs. Anderson was made a partner for several reasons among which are:

1. She owned an undivided one-half interest in all of the property that went into the partnership. The partnership could not have operated had it not been for her capital investment.

2. She had been contributing vital services to the old partnership and she continued to take an active part and to contribute to the production of the 1945 income by her services in both 1944 and 1945.

3. She took an active part in the partnership conferences and helped to determine the policies under which the partnership operated.

ARGUMENT

SUMMARY

The contributions of the members of the partnership were substantial and made with a bona fide intent to create a genuine partnership.

The uncontradicted evidence shows the partnership to be genuine from its inception.

The Family partnership cases applicable to the instant case.

The formation of the partnership was for a business purpose.

Whether the Partnership is genuine is purely a question of fact.

The decision of the District Court is based upon uncontroverted evidence corroborated by disinterested witnesses.

Conclusion—Were the Findings of Fact of the District Court clearly erroneous?

THE CONTRIBUTIONS OF THE MEMBERS OF THE PARTNERSHIP WERE SUBSTANTIAL AND MADE WITH A BONA FIDE INTENT TO CREATE A GENUINE PARTNERSHIP

The contributions of Agnes Anderson, Noel J. Anderson and Robert M. Anderson may be summarized as follows:

Agnes Anderson performed substantial services for the old partnership, cooking, driving truck, tractor, and driving haying machinery (R. 45, 46, 195, 196 and 197.).

Noel Anderson had always considered that his wife, Agnes, was entitled to a share of the earnings of the old partnership (R. 61), and Agnes had always claimed such a share (R. 197).

The joint account of Noel Anderson and Agnes Anderson was started in 1941 and all money received from the old partnership was deposited in this account (R. 44).

Agnes Anderson claimed a one-half interest in this account at all times (R. 197) and of course claimed a one-half interest in all of the property both real and personal which was transferred to the new partnership and Noel Anderson recognized that she was an owner of one-half of this property (R. 61).

The money was paid for the share of Aleta P. Anderson and Selma I. Finney's share in the estate land, cattle and farm equip-

ment, from the joint bank account of Noel Anderson and Agnes Anderson (R. 64 and 65).

Agnes Anderson performed vital services for the partnership in 1945. She cooked for a crew of fourteen men for branding in 1945 (R. 202, 203, 241 and 251). She hauled wheat, went to town for supplies and repairs, drove truck for scattering grasshopper poison, baled straw and worked a full day with the men (R. 195, 196, and 197). This was not casual work but occurred day after day (R. 196).

During the entire period since the formation of the new partnership, Agnes Anderson has written checks on the partnership account for business purposes. (R. 205). She was familiar with the accounts (R. 204), made some entries in the books (R. 204), and agreed to the purchase of Government bonds in their joint names (R. 208).

The contributions of Noel J. and Robert M. Anderson may be summarized as follows:

These boys had worked on the farm diligently from the time they were able to ride a horse or drive a tractor which began in the year 1938 or when they were twelve years old (R. 215, 218, 237, and 238). Because of their contribution in building up the property in the old partnership (R. 216, 218 and 137), the plaintiff made possible their entry into the new partnership under very reasonable terms (R. 137).

These boys prepared the ground and did all of the summer-fallowing and seeding of 1100 acres in 1944 for the 1945 crop which was the first crop raised by the new partnership (Noel's

testimony R. 71 and 72) (Noel J.'s testimony R. 216, 217 and 218) (Robert M.'s testimony R. 238, 239, 240, 241, and 254). They were not paid wages for any of this work (R. 232 and 236). They cared for the cattle in 1944 (R. 218).

Robert continued the work in 1945 doing part of Noel J.'s work as well as his own (R. 201, 240, 241, 242, 243, 244, 254). Robert's work in 1945 consisted of branding, summerfallowing, cultivating the ground through the summer, harvesting the 1945 crop, seeding the crop in the fall of 1945 for 1946. He worked with the cattle, riding and otherwise.

Maurice Farrell testified of the work of Noel J. Anderson (R. 81) and Ted Ritland testified from personal knowledge of work done by both boys in the field, caring for cattle, and doing all kinds of farm work (R. 181 and 182).

Since Noel J.'s return from the military service in January of 1946, he has spent all of his time working on the ranch except two quarters of college in the fall and winter of 1946 and 1947 all of which was spent as a partner in the partnership of Noel Anderson & Sons (R. 222) and the operations on the ranch have been carried on under the terms of the partnership agreement each year since the year 1945 and in each year, Agnes and the two boys, except for such time as they were in the military service, have performed important and necessary services (R. 225).

The boys have been permitted to draw a portion of their earnings in the partnership at all times since the partnership began. The withdrawals were limited to necessary expenses until their

respective shares in the partnership were fully paid. From that time on there have been no restrictions in the amount that they could draw up to their respective shares. (R. 234).

THE UNCONTRADICTED EVIDENCE SHOWS THE PARTNERSHIP TO BE GENUINE FROM ITS INCEPTION

This evidence may be summarized as follows:

The discussion by Noel Anderson with his attorney in October, 1944, and the definite verbal agreement entered into during the Christmas week of 1944 (R. 60, 61, 199, 200, 201, 219, 220, 244, 245, and 246).

Noel J. agreed to the partnership when he was home on furlough in January of 1945 (R. 202, 219, 220). Robert M. Anderson agreed to the terms which were outlined in detail in his testimony (R. 244-245).

The federal income tax returns (Ex. 10 and 24).

The entries in the cash book (Ex. 9 A, B, C1, D. and E).

The ledger accounts of each member of the partnership (Ex. 12 A to J inclusive). These Exhibits show the complete record of the shares of each partner in the partnership earnings and the exact amounts drawn by each from the beginning of the partnership, January 1, 1945 and through the year 1950.

The fact that all banking business has been transacted under the name of Noel Anderson & Sons continuously from April 30, 1946 (R. 103).

The Deeds for their respective interests in the real property executed and delivered to Agnes, Noel J. and Robert M. (Ex's 21, 22 and 23, R. 104, 226, 250).

The fact that all of the details of the partnership had been set up and had been carried on for a period of more than two years prior to any question being raised by the Bureau of Internal Revenue (R. 110), the first audit being made in March, 1947.

The fact that the check to pay the deficiency assessment in income tax against the plaintiff which is the subject of this action was drawn on the account of Noel Anderson & Sons (Ex. 27, R. 119).

The fact that the State land which had been under lease to A. E. Anderson individually before his death was immediately turned over to the new partnership for its use and that said lands have been grazed and cultivated by Noel Anderson & Sons since January 1, 1945 (R. 119, 120) and that the State land leases dated February 28, 1943, were assigned to the new partnership in the regular course of the business of the partnership. (Ex. 28 and 29).

The fact that the 1945 taxes were charged to Noel Anderson & Sons (R. 159).

The testimony of Ted Ritland, a disinterested witness who has lived most of his life on lands adjoining the Anderson ranch (R. 179). (We call the Court's attention to an error by the reporter in the spelling of Mr. Ritland's name. The correct spelling is "Ritland" instead of "Ritman"). Mr. Ritland knew of the work of Robert M. and Noel J. since the time they were old enough, consisting of seeding, watering and branding cattle, building fences, running and repairing tractors and combines,

summerfallowing and seeding (R. 180, 181). The fact that he had business with Noel Anderson & Sons right after his return from the army in 1945 (R. 182) and that he gave a check to Noel Anderson & Sons for seed wheat which he had purchased from the partnership (R. 182). He knows of the summerfallowing and harvesting that Robert did in the year 1946. The fact that Robert was engaged in seeding the crop up to the time he went to school (R. 182). He also described the field work of Noel J. Anderson done in 1946 from the spring on. This was mechanical work. They were engaged in large scale farming which takes skill to operate and the boys had that skill (R. 184-185). He knew of the cooking that Agnes Anderson did for the old partnership as well as the new—that she helped in haying, in going for repairs, in moving trucks, in pulling hay up on the stack (R. 187, 188).

The further fact that the members of the Anderson family held conferences from time to time to discuss the questions that might come up with reference to the purchase of new machinery or land (R. 203, 226, 227, 228). Also the fact that the boys took an active part in the discussion (R. 228, 256, 257).

The fact that all members of the partnership were very familiar with the books and accounts of the partnership (R. 204, 207, 208, 222, 223, 224, 247, 248, 249, 250). The further statement in Robert's testimony that he observed his father keeping books from time to time and knew that such books were kept in accordance with their agreement (R. 251).

The testimony of both sons as to their work in the partnership

during the entire time that they were home beginning with the year 1944 (R. 217, 218, 222, 242, 243).

The fact that the boys have shared in the earnings of the partnership beginning in the year 1945 (R. 244, 245, 246). That they were not restricted in their drawings after their shares were paid for (R. 234). This is further evidenced by the fact that at the close of the year 1950, Robert M. had actually overdrawn his share by a small amount (R. 102).

THE FAMILY PARTNERSHIP CASES APPLICABLE TO THE INSTANT CASE

The facts in this case place it squarely within the rules laid down by the Courts in a number of family partnership cases.

> "The Court will look through the form to the substance of the transaction to get at the facts, no formal agreement or partnership agreements are necessary"—Eckhard vs. Comm. 182 F.2d. 547.

In Britt's Estate vs. Comm. 190 F.2d. 946, the father and his three children had been engaged in a farming venture. The husband and wife and the three children then verbally agreed to form a partnership. The husband said his wife should be a partner in the farming venture because she had worked in accumulating the property and was still working as hard as the others. The husband was in poor health for a long period before his death. In deciding that the partnership was genuine as to all members, the Court said:

> "Due to the relationship involved and to the conse-

quence which sometimes flow therefrom, purported family partnership agreements should be closely, but fairly, scrutinized. *The approach should be realistic not formalistic.*

Members of a family are as much entitled as anyone else to form business partnerships and such partnerships are entitled to recognition for federal tax purposes so long as they are formed in good faith for business purposes and not merely as a subterfuge to defeat the operation of the tax laws. There is no legal hypothesis in the label "partnership". Courts should, and will, look through the label to the facts that lie beneath. But when the facts square with the label, *the partnership status should not be rejected merely because its constituent members are of the same family.*" (Emphasis supplied)

Appellant insists on applying the arbitrary tests which the Supreme Court discarded in the Culbertson case. The Court of Appeals for the Fifth Circuit in a recent case had this to say:

"If there is anything which emerges with clarity from the decision in the Culbertson case, * * * it is that the artificial and so called objective tests of the existence of a partnership set up in the Tower and Lusthaus cases as conclusive are not such. The question in each case is one of fact to be determined like any other fact question upon the evidence as a whole, and as, stated in the committee reports. The same standards apply in determining the bona fides of an alleged family partnership as in determining the bona fides of other transactions between family members."

"It, therefore, is, and remains true that the acid test for determining the question of the reality and validity vel non of a family partnership is to be found in the answer to the question: *Was the arrangement real, honest and bona*

fide, so that all the ordinary incidents and effects of an agreement of partnership flow, each partner bound by the losses, each sharing the profits, in accordance with his agreement? If the answer is, yes, whatever may be found to be the intent or result tax wise, there was a partnership." Alexander vs. Comm. 190 F.2d. 753. (Emphasis supplied)

In still a later case, the Court of Appeals for the Fifth Circuit in discussing a family partnership case said:

> "It is quite plain that what has happened below here is the same thing that happened in the tax court in the Culbertson case which caused the Supreme Court to say: '* * * that is the vice in the 'tests' adopted by the Tax Court. It assumes that there is no room for an honest difference of opinion as to whether the services or capital furnished by the alleged partner are of sufficient importance to justify his inclusion in the partnership'. In short, the tax court has permitted itself to determine contrary to the agreements of the parties that the amount of capital furnished or the services rendered were not a sufficient consideration under the tax statutes to effectuate the creation of a partnership."—Turner vs. Comm. 199 F.2d. 913.

In the Culbertson case, supra, the taxpayer-father had been in partnership in the cattle business with another man for many years. The partner decided to retire and the taxpayer-father purchased his interest in the partnership. He then sold a one-half interest to his four sons all of whom had grown up on the ranch of the first partnership and had taken an active part in the work of the ranch. When the father sold the one-half interest to the boys, he took their note for the amount and later credited

a payment of a substantial part of the note as a gift to the sons. The two older sons were in the Military Service for a part of the time of the tax years involved. The two younger sons were in school for a portion of the time. It will be readily seen that the facts involved in the Culbertson case and in the case at issue are parallel. In the first decision of the Circuit Court in this case, 168 F.2d. 976, the Court said:

> "Income generally should be taxed to him who owns it. The Culbertson boys owned one-half the cattle that produced the income here."

The Court so held in spite of the fact that the boys had not paid for their share. Likewise, while the Anderson boys had not paid for their share in the partnership during the year of 1945, nevertheless, they were each owners of one-sixth of the cattle and the crop.

In this same decision, the Court went on to say:

> "We do not consider that it is illegal, income-tax-wise or otherwise, for a partnership to be formed in consideration or contemplation of *services rendered or to be rendered,* by the partners." (Emphasis supplied)

And the fact that the services of Noel J. and Robert M. in caring for the cattle and in cultivating the land for seeding the crop in 1944 were before the date of the beginning of the partnership does not nulify the fact that their services were largely and directly responsible for the creation of the income in 1945.

THE FORMATION OF THE PARTNERSHIP WAS FOR A BUSINESS PURPOSE

Noel Anderson's health was not good. He could not continue to carry the load that he had carried in the A. E. Anderson & Son partnership. The entry of the boys into the place of responsibility in carrying on the business was essential. His wife, Agnes, had a one-half interest in their property which was necessary for the successful operation of the Anderson ranch. Her membership in the partnership was clearly for a business purpose. The Court of Appeals for the Fifth Circuit in its first decision, 168 F.2d. 976, went on to say:

> "When the proof conclusively shows that a family partnership was entered into for the *benefit of the business* and not for the purpose of evading, avoiding, or dividing income taxes, it will be deemed a partnership for income tax purposes even as it is recognized in law for all other purposes." (Emphasis supplied)

The Court in this same decision commented further as follows:

> "Neither the Constitution, the statutes, nor public policy requires that partnerships between fathers and sons be outlawed or discouraged. The desire of a partner in any age or clime, with a business that he cherishes and a son that he loves, to have such son with him in his business and to carry it on when he no longer can, was not rendered anathema by the Lusthaus and Tower cases, and aberrations from the salutary rules announced in those cases should not now do so."
>
> "To conclude in this case that the plan and purpose of an aging father to enlist the interest and services of his

four ranch-reared, experienced and stalwart sons in the carrying on of his and his partner's life work was not for the partnership's benefit seems to require the exaltation of suspicion over the realities to an extent that the exigencies of the times for tax collection neither deserve nor demand."

If we change the words "aging father" in the above quotation to a "father in ill health" and the word "four" to the word "two" referring to the sons, we would have a statement that applies absolutely to the case at issue.

WHETHER THE PARTNERSHIP IS GENUINE IS PURELY A QUESTION OF FACT

"The finding of fact that there is (or is not) a partnership by the trier of fact (Tax Court or Jury) if supported by the evidence is final"—Davis vs. Comm. 161 F. 2d. 361.

This Court said in Harkness vs. Comm. 193 F.2d. 655:

"In our opinion, the Court properly interpreted the Culbertson case, the essential determination of which is that the question there considered and presented by the record here is *one of fact.*"

To the same effect is the holding in Toor vs. Westover, 200 F. 2d. 713. *The question of intent is a question of fact*—Ardolina vs. Comm. (3rd) 186 F.2d. 176.

"The test for determining recognition of a partnership for Federal income tax purposes is whether 'the parties in good faith and acting with a business purpose intended to join together in the present conduct of the enterprise'. *This question is one of fact.*" (Citing Toor vs. Westover, supra,

and Harkness vs. Comm., supra, - Renner vs. U. S. 205 F.2d. 277 at 288).

"The acid test for determining their validity for income tax purposes is to be found in the answer to the question: Was the purported partnership arrangement real, honest and bona fide or was it a mere pretense and a sham? *The question in each case is one of fact* to be determined by the evidence as a whole". - Seabrook vs. Comm. (5th) 196 F.2d. 322. (Emphasis supplied)

THE DECISION OF THE DISTRICT COURT IS BASED UPON UNCONTROVERTED EVIDENCE CORROBORATED BY DISINTERESTED WITNESSES

The clear cut testimony of each of the four members of the Anderson family, especially commended by the decision of the District Court, and the corroborated testimony of Ted Ritland (Ritman) and Maurice Farrell, is ample to justify the conclusion that the *decision was not erroneous.* The evidence submitted by the Defendant does not contradict in any way the testimony of the Plaintiff and his witnesses. The Appellant has sought solely by inference to show that the intention to form a partnership to operate the Anderson ranch was not genuine. For the sake of argument, the Appellee could admit all of the documentary evidence submitted by the Defendant and all the testimony in support thereof and there would still be ample evidence to justify the decision of the Court below.

The Findings of Fact and Conclusions of Law of the District Court "*will not be set aside unless clearly erroneous and due regard shall be given to the opinion of the trial Court to judge the credibility of the witnesses.*"

Gen. Cont. Assn. vs. U. S. 202 F.2d. 633

Schallerer vs. Comm. (7th) 203 F.2d. 100

Forbes vs. C. I. R. 204 F.2d. 777

Russell vs. Comm. (1st) 208 F.2d. 452

Coon River Fuel Co. vs. Comm. (3rd) 209 F.2d. 187

Comm. vs. Culbertson 337 U.S. 733

The rule governing this appeal has been well stated in Pacific Portland Cement Co. vs. Good Mach. etc. Corp, 178 F.2d. 541, as follows:

> "Under the interpretation which the Supreme Court, and this and other Courts of Appeal have placed upon this section, the findings of a trial judge will not be disturbed if supported by substantial evidence. *Full effect will always be given to the opportunity which the trial judge has, denied to us, to observe the witnesses, judge their credibility, and draw inferences from contradictions in the testimony of even the same witness.* (Cases cited). This is the meaning of the provision that findings should not be set aside unless clearly erroneous (Case cited)". (Emphasis supplied)

CONCLUSION

WERE THE FINDINGS OF FACT OF THE DISTRICT COURT CLEARLY ERRONEOUS?

Among other findings the District Court in its decision stated:

1. "There was nothing new or novel about having a family partnership in the Anderson family; the father and son had carried on such a partnership in the name of A. E. Anderson & Son for about nine years, and it was quite

natural to expect that upon the death of the father another family partnership would succeed the old one. *It is generally known that the principal farming operations are carried on in the spring, summer and fall, and the sons were there in 1944 to prepare the soil and put in the crops for 1945, and in 1945 Robert was there to put in crops for 1946, and substitute for his brother, Noel, Jr., who was then in the Armed Services of his country.*"

2. "The Court was much impressed with the appearance of these upstanding young men while testifying, as was also the case in the instance of the parents who preceded them, who have been respected citizens of Chouteau County for many years. After all it's what you believe, as the court remarked during the trial, and now upon a consideration of all the evidence, the court has thus far been unable to find fault in the testimony of members of this family or in their manner of giving it, and finds corroboration in respect to labor they performed in furtherance of their claim of formation of partnership for 1945".
3. "Grave account is made of the fact that transactions are found to have been conducted in the name of A. E. Anderson & Son, A. E. Anderson, Noel Anderson, Agnes Anderson, instead of in the name of Noel Anderson & Sons in 1945. What does the record show? *Importantly it shows the defendant admits good faith on the part of the Anderson family "to create a partnership at some future time"*. If good faith is admitted, after hearing the testimony of the Anderson family, and all members thereof declare, and established from their partnership records and other sources, that the partnership was to become effective and was in operation during the year 1945, how can the admission of

good faith be consistently reconciled with a rejection of the evidence on the subject of time when the partnership was established and in operation? The Court believes from the testimony of the Andersons and other living in their neighborhood, and from the records of the partnership, that good faith and honesty of purpose has been disclosed, and that it would be difficult for one with an open mind to note the appearance of those witnesses on the stand and their manner of testifying without being impressed with their sincerity, and at the same time taking into account any self interest they might have in the result."

4. "*It might be said here that there would have been no income or profits for the years 1945 and 1946 had it not been for the services rendered by the four partners as above outlined.*" (Emphasis supplied)

5. "That the formation of a family partnership for the purpose of conducting farming, ranching and livestock operations in Chouteau County, Montana, was discussed and planned by members of the plaintiff's family in the month of April, 1944. That the plan was consummated at a family council held during the latter part of December, 1944, at which time Noel Anderson and his wife, Agnes Anderson, and a son, Robert M. Anderson, made an agreement which was subsequently, namely in the month of January, 1945, ratified by Noel J. Anderson, another son. That said agreement provided for the interest and shares of each member of the partnership. That the said Noel Anderson, Agnes Anderson, Robert M. Anderson and Noel J. Anderson each made substantial contributions to said partnership during the time involved in this action. That Robert M. Anderson and Noel J. Anderson prepared the soil and put in the crops in 1944 for the 1945

crop. That Agnes Anderson supervised the cooking for hired help, drove a tractor and hauled grain during the year 1945 and that Noel Anderson, who was in poor health at the time, assisted in advising and over-seeing the work of his sons. That the farming and ranching operations during the year 1944 and during the entire year of 1945 were carried on by said partnership in good faith and have so continued ever since."

We submit that the decision and findings of fact are based upon uncontradicted testimony and *cannot be considered* "*erroneous*" and that there is nothing in the record in this case that would leave in the minds of this Court "*a definite and firm conviction that a mistake had been committed*" and that, therefore, the decision of the Court below must be affirmed.

Respectfully Submitted,

VERNON E. LEWIS

Attorney for the Appellee

April 12th, 1954.